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CASE AND COMMENT

LAW REFORM (LIMITATION OF ACTIONS, ETC.) ACT, 1954

THE alliance between law reformers and private members of Parliament is a minor but most beneficent constitutional development. The readiness of governments to commission inquiries into the defects of the law is by no means matched by their willingness to find parliamentary time for proceeding with the resulting proposals; the official pigeon-holes will often contain recommendations for improving the statute book, already prepared by an expert committee. A Member of Parliament who is lucky in the ballot is well advised to take up such a subject, for the chances are strong that it will commend itself, and will not be likely to fan party feelings. Once the necessary opening has been found, the Government is usually generous in providing drafting and other assistance.

For the much-needed reforms which the new Act contains we have to thank the Committee presided over by Lord Justice Tucker (as he then was) in 1948-49 and Mr. J. W. W. Peyton, M.P. First and foremost the Act repeals the Public Authorities Protection Act, 1893, which by laying down a limitation period of six months (extended in 1939 to one year) for most actions for damages against public authorities was the cause of some striking injustices. This Act had itself partially repealed the special limitation clauses contained in over a hundred earlier Acts, but it replaced them with so sweeping, stringent and vaguely worded provisions that the remedy was worse than the disease. Later generations have come to regard this Act as a blot on the statute book, not only in general policy but also in details, such as its penal provisions as to costs against private plaintiffs.

At the same time the new Act abolishes the special limitation periods provided in favour of certain public corporations in the

Acts of the post-war nationalising epoch which concerned coal, new towns, transport, electricity, gas and airways, and the special periods provided by the Army, Air Force and Visiting Forces Acts. None of these were as oppressive as the Public Authorities Protection Act, but few will be sorry to see them go.

An important general reform then follows: the limitation period for actions for damages in respect of personal injuries is reduced from six years to three. This is done by amendment of the Limitation Act, 1939, and the alteration is in no way confined to actions against any particular defendants (the Act expressly binds the Crown). Lord Justice Tucker's Committee had recommended an even more drastic curtailment to two years, on the ground that it was particularly desirable that actions for personal injuries should be brought to trial quickly, while the evidence was still fresh in the minds of parties and witnesses; but it was recommended that the court should have discretion to extend the period up to six years in special cases. The Act instead provides a three-year period with no provision for extension.

As in the Law Reform (Personal Injuries) Act, 1948, "personal injury" is not precisely defined, but it is to include "any disease and any impairment of a person's physical or mental condition"; it is therefore clear that it includes death, whereas it probably does not do so in the Crown Proceedings Act, 1947, s. 10, which speaks of "death or personal injury." It is true that the long title of the Act of 1948 also speaks of "personal injury or death," but the contents of that Act indicate that the two things may overlap. The class of actions which are subject to the new Act is further limited to actions "for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of provision made by or under a statute or independently of any contract or any such provision)." Whether these words have a restrictive meaning, or whether they merely mean "for tort, breach of contract or breach of statutory duty" is not clear. Since the latter, if intended, would have been so much simpler to say, a restrictive meaning must be suspected; yet what legal wrong is not a breach of duty within the wide parenthetical definition? The same words occurred, but without the addition in parenthesis, in the Personal Injuries (Emergency Provisions) Act, 1939, and in *Billings v. Reed* [1945] K.B. 11 they were held to include an action framed in trespass instead of negligence, since "breach of duty" covered trespass even if "negligence" did not. The phrase may therefore be held in affection by the draftsman, but it may be doubted if the same emotion will be felt by the profession. The Tucker Committee had in fact recommended that the shortened period should *not*

apply to actions for trespass to the person, but how they proposed to draw the line between these and actions for negligence was not explained; they also proposed to exclude actions for false imprisonment, malicious prosecution and defamation. Again as in the Personal Injuries Act, the legislature leaves us to guess whether these three torts are "personal injuries," but in the case of the new Act it is much more likely that these loose ends will have to be tidied up by the courts.

Two other reforms of importance are closely analogous: the period for bringing actions under the Fatal Accidents Act, 1846, is extended from twelve months after the death to three years; and the Act repeals the awkward requirement of the Law Reform (Miscellaneous Provisions) Act, 1934, that if the tortfeasor is dead there can be no action against his estate unless the tort was committed not more than six months before his death.

One concession has, however, been made in exchange for the provision that the Act shall bind the Crown: it is provided that actions against the Crown for loss or damage of registered postal packets, which are already severely hedged about by the conditions imposed by the Crown Proceedings Act, 1947, s. 9, must be instituted within twelve months of the date of postage. It would be ungracious not to let this pass in so welcome and admirable a Law Reform Act.

H. W. R. WADE.

LAW REFORM (ENFORCEMENT OF CONTRACTS) ACT, 1954

At long last section 4 of the Statute of Frauds has ceased (almost) to enable promises to be broken with impunity and law students to waste fruitless hours on futile distinctions as to what is a contract made in consideration of marriage or one not to be performed within one year of the making thereof. Section 17 (in its modern form section 4 of the Sale of Goods Act, 1893) has also been repealed. Judges, among them Lord Nottingham, are reputed to have been responsible for drafting the famous statute of 1677. Twice in the present century other judges constituting with practitioners law reform committees had recommended, not for the first time, the repeal of these provisions. But it was left to a private member in the Commons and a peer who is the President of the Society of Public Teachers of Law to sponsor the necessary legislation to implement these recommendations. The Law Reform (Enforcement of Contracts) Act received the Royal Assent on June 4, 1954. On July 27 judgment was given in the first reported case on its

application—*Crawfords (Ramsgate), Ltd. v. Williams & Steer Manufacturing Co., Ltd.* [1954] 1 W.L.R. 1130. The Act removes the requirement of written evidence for four out of six specific types of contract for which it was required by the Statute of Frauds, 1677, mainly to obviate perjury in days long before the parties to litigation could themselves give evidence. The four types are :

1. Promises by executors to answer for damages out of their own estates.
2. Contracts made in consideration of marriage.
3. Contracts not to be performed within one year of the making thereof.
4. Contracts for the sale of goods to the value of £10 or upwards.

Of the other two types, section 40 of the Law of Property Act, 1925, had already replaced the Statute of Frauds with regard to contracts relating to the sale or other disposition of interests in land. There will always be certain contracts where the evidentiary requirement of writing should be a condition precedent to their enforcement, and there has never been any serious proposal to dispense with the requirement of writing in contracts for the disposition of land, which, after all, are agreements for even more formal written transfers by deed. This leaves contracts for guarantees or suretyship or, as the Statute of Frauds calls them, "contracts to answer for the debt, default or miscarriages of another."

The Law Revision Committee had in 1937, by a majority, recommended that there should be no exception in favour of retaining writing for this type of contract; but four members, including the present Lord Chief Justice, who is also a member of the Law Reform Committee set up in 1952, wanted to retain the requirement in the case of guarantees. In practice guarantees mainly relate to customers' accounts at a bank which will inevitably require a written guarantee, but there is possibly some sort of danger for the "small man" lest he be led unaware by a friend into guaranteeing a payment to a tradesman without realising that he had incurred liability. So the requirement of writing remains for this type of contract and with it the considerable volume of case law which seeks to distinguish a guarantee from an indemnity and requires no written evidence.

The repeal of section 4 of the Sale of Goods Act came before Pilcher J. in *Crawford's* case (above) on the question whether a defence which relied on the section could stand; it had been delivered four months before the repeal received the Royal Assent,

but the repealing provision (like the partially repealed section 4 of the Statute of Frauds) applies in relation "to any contract whether made before or after the commencement of this Act." Had the defendants acquired a vested interest in the defence? The court held that they had not on the ground that section 4 of the Sale of Goods Act had been a procedural section and therefore the court was justified in looking at the law at the time when the case came before it. Since the procedural provision related to proof at the time of the hearing the court was no longer fettered by the section and could grant a remedy without proof of writing. So it may be that the last case to figure in the Reports on this aspect of the Statute of Frauds confirms that the requirement of writing did not change the substantive rights of the parties. Yet the defendants may well feel that they have been deprived of their protection by retrospective legislation.

E. C. S. WADE.

STATUTORY INSTRUMENTS—VALIDITY—STATUTORY INSTRUMENTS
ACT, 1946

IN *Regina v. Sheer Metalcraft, Ltd.* [1954] 1 Q.B. 586 the company was charged at the Surrey Assizes with infringements of a Statutory Instrument which regulated the price of iron and steel. The Statutory Instrument itself had been printed without its schedules by the Queen's Printer and complied with all the requirements of section 2 of the Statutory Instruments Act, 1946, relating to numbering, printing and publication. The detailed schedules had not been printed but the Minister had omitted to specify that printing was unnecessary. This he should have done under the regulations made on the authority of section 2, which contemplated that a Statutory Instrument could be excepted from the requirement as to printing and sale and therefore presumably that part of a Statutory Instrument, *i.e.*, a schedule, could be so excepted. Had the section stood alone the defendants' plea that the Statutory Instrument was invalid because it was incompletely printed might have succeeded. But section 3 deals with two supplementary provisions relating to publication: subsection (1) requires the Queen's Printer to keep lists showing the date on which Statutory Instruments are printed and issued; subsection (2) is as follows:

In any proceedings against any person for an offence consisting of a contravention of any such statutory instrument, it shall be a defence to prove that the instrument had not been issued by Her Majesty's Stationery Office at the date of the alleged

contravention unless it is proved that at that date reasonable steps had been taken for the purpose of bringing the purport of the instrument to the notice of the public, or of persons likely to be affected by it, or of the person charged.

This subsection suggested to the judge that the Statutory Instrument as a whole including the schedules was valid as soon as it was made, *i.e.*, in this case signed by the Minister or his authorised deputy. He, therefore, ruled that the prosecution could bring evidence to show that reasonable steps had been taken to bring the purport of the instrument to the notice of persons likely to be affected by it, such as the defendants; it was, then, no defence that that part of the Statutory Instrument which consisted of the schedules had not been issued in accordance with section 2. This view seems to bring the law back to where it stood before Parliament regulated the publicity to be given to Statutory Instruments by the 1946 Act. In *Johnson v. Sargent* [1918] 1 K.B. 101 it was held that a Statutory Instrument did not take effect until it became known. The present case shifts the onus of proving the necessary publicity onto the prosecution. A Statutory Instrument need not be issued in accordance with section 2; it can be enforced once it has been made and adequately publicised.

It is one thing to omit printing detailed schedules, but if the same procedure were applied to Statutory Instruments as a general rule we might find that a Statutory Instrument made upon a sheet of foolscap signed by a relatively junior civil servant and never printed (as happened on one occasion during the last war) could be enforced provided that the Crown could prove that its contents had been given publicity. Happily the procedure under section 2 is now well established and we can be confident that no Department will take advantage of the loophole which the case under discussion offers to them to depart from the convenient uniform procedure which the Act has provided.

E. C. S. WADE.

CERTIORARI—DISCIPLINED SERVICES—DISCRETION OF THE COURT

THE love of the British subject for his constitutional rights is well illustrated by *Ex p. Fry* [1954] 1 W.L.R. 730. The applicant was a fireman who, after disobeying an order to clean a superior officer's uniform, was visited by the Chief Fire Officer with the lightest possible "punishment" (a caution) provided for by the Fire Services (Discipline) Regulations, 1948. This he challenged by moving the Queen's Bench Division for leave to apply for certiorari

to quash the Chief Fire Officer's decision, and when this was refused he appealed to the Court of Appeal. The appeal was dismissed.

The legal interest of the case lies in the differing reasons given for the refusal of leave. In the Divisional Court Lord Goddard C.J., with whom Hallett J. agreed, referred to his recent decision in *R. v. Metropolitan Police Commissioner, ex p. Parker* [1953] 1 W.L.R. 1150 (the taxicab-driver's case), and to his observation that: "Where a person, whether he is a military officer, a police officer, or any other person whose duty it is to act in matters of discipline, is exercising disciplinary powers, it is most undesirable, in my opinion, that he should be fettered by threats of orders of certiorari and so forth, because that would interfere with the free and proper disciplinary exercise of the powers that it may be expected he would otherwise use." He went on to hold that a chief fire officer in such a case could not be said to be acting judicially or quasi-judicially any more than a schoolmaster disciplining his pupils, and that he could not be said to represent such a "court" as is amenable to certiorari. But in the Court of Appeal it was held by Singleton L.J. (with whom Hodson and Morris L.J.J. agreed) that in the earlier case the Lord Chief Justice's decision was based on two grounds, first that there was no judicial or quasi-judicial capacity, and secondly that certiorari was a discretionary remedy which ought in such a case to be refused. Singleton L.J. then said: "In this case I prefer to base my decision upon the second ground," and he proceeded to explain why the fireman's course of conduct was not such as to excite the sympathy of the court.

Now it must be taken that both these alternative reasons underlie the two judgments of Lord Goddard C.J. But, to put it no higher, the first is distinctly more in evidence than the second. Lord Goddard's remarks were principally to the effect that such cases were quite outside the proper scope of certiorari and that there was no jurisdiction to issue it. The Court of Appeal's preference for resting the decision on an exercise of judicial discretion seems to indicate pretty plainly that the court felt uneasy about ruling that such cases lay outside the scope of certiorari and contained no judicial or quasi-judicial element. Perhaps this is a sign that the courts are reaching the limits of their post-war tendency of narrowing down the classes of administrative powers which will be required to be exercised in accordance with the old-established principles of natural justice. If so, the sign is a welcome one, for the taxicab-driver's case and its predecessors have given rise to

considerable anxiety—see 67 L.Q.R. 103 and 70 L.Q.R. 203. Everyone would agree that a line must be drawn between meritorious and unmeritorious cases, and that the courts should intervene only where there is a substantial violation of the rules of fair procedure. The danger has been that the good claims would be thrown out with the bad, by a total denial of jurisdiction. It was by developing the principles of natural justice that the courts advanced furthest, subject always to the limitations imposed by the English separation of powers, towards the creation of an administrative law in which the best elements of judicial technique would be imparted to the executive arm of the State. Great hopes cannot be founded on *Ex p. Fry*, but some comfort may be drawn from the Court of Appeal's recognition that a discretionary jurisdiction exists.

H. W. R. WADE.

SOLICITOR AND CLIENT—PRIVILEGE—STATUTORY INTERPRETATION

THE question whether a common law right is of such importance as to withstand apparently comprehensive general words in a statute was raised in clear-cut form by *Commissioner of Inland Revenue v. West-Walker* [1954] N.Z.L.R. 191. As re-enacted and enlarged in 1948 the relevant provision read :

“ Every person, whether a taxpayer or not (including any officer employed in or in connection with any Department of the Government or by any public authority) shall, if required by the Commissioner or by any officer authorised by him in that behalf, furnish in writing any information or produce any books or documents which the Commissioner or any such officer considers necessary or relevant for any purpose relating to the administration or enforcement of this Act . . . and which may be in the knowledge, possession, or control of that person.”

The Commissioner had been unable to get in touch with a taxpayer believed to owe a considerable sum for income tax. Accordingly he served on a solicitor who had acted for the taxpayer in certain transactions a notice requiring the solicitor to furnish *inter alia* “ any information . . . which may be in your knowledge . . . relating to the . . . financial position ” of the taxpayer. The solicitor declined to do so without his client's authority. It was held by

Fair, Gresson, Hay and North JJ., Stanton J. dissenting, that this refusal was justified to the extent that the information fell within the common law privilege protecting from disclosure communications between solicitor and client.

The case stated by means of which the question came before the Court of Appeal was defective in that it contained no findings of fact as to the nature of the information and documents in the solicitor's possession. Moreover the Commissioner's notice may have been invalid for uncertainty. The court therefore hesitated before consenting to decide a somewhat abstract point of law. But the course taken did concentrate attention on the issue of principle. A further consequence was that the court was not called upon to define the scope of the privilege precisely, although it was made plain on the one hand that admissions made by a client to his solicitor in the course of obtaining professional advice are covered by the privilege, and on the other that documents merely entrusted to a solicitor for safe custody are not protected.

In New Zealand the courts are enjoined by a section in the Acts Interpretation Act to deem every provision remedial, and to accord to it such fair, large and liberal construction as will best ensure the attainment of the object of the provision according to its true intent, meaning, and spirit. No suggestion was made in the present case that help was to be had from this section. Nor was emergency legislation involved. The ordinary rules for the construction of statutes had to be applied.

The majority of the judges were not prepared, as North J. put it, to accept the view that an ancient privilege, so vital both to the administration of justice and to the public interest, had been taken away by a side wind: a general Act should not be understood to repeal the common law on a special subject of this kind unless there was something in the Act to indicate an intention to deal with that subject. The authorities chiefly relied on were *Duke of Newcastle v. Morris* (1870) L.R. 4 H.L. 661, where an Act bringing "all debtors" within the bankruptcy laws was held to include persons having the parliamentary privilege of freedom from arrest, but not to affect that privilege because it was "not specially struck at"; *The King v. Bishop of Salisbury* [1901] 1 K.B. 573, affirmed [1901] 2 K.B. 225, where a general Act relating to vestry meetings and giving a right to vote to every ratepaying inhabitant present was held not to alter the common law rule that the minister could not vote at an election of a parishioners' churchwarden; Lord Birkenhead's adoption in *Viscountess Rhondda's Claim* [1922] 2 A.C. 339, 368-75, of the method of

interpretation followed, as was said in *Stradling v. Morgan* (1559) Plowd. 205, by the sages of the law—a method discussed by Mr. H. W. R. Wade in 1954 C.L.J. 101; and Lord Simon's statement in *Nokes v. Doncaster Amalgamated Collieries, Ltd.* [1940] A.C. 1014, 1022, that "... where, in construing general words the meaning of which is not entirely plain there are adequate reasons for doubting whether the legislature could have been intending so wide an interpretation as would disregard fundamental principles, then we may be justified in adopting a narrower construction." The relevance of these cases is perhaps diminished by two circumstances. First, none was concerned with a dispute between a public officer and an individual as to the ambit of powers manifestly intended to curtail individual rights. Secondly, in each there were considerations arising from the history, language or purpose of the legislation tending to favour the narrower construction. In the majority judgments in *West-Walker's* case it is pointed out, however, that at least the decision will not stultify the purpose of the provision, since a wide sphere remains for the exercise of the Commissioner's powers. This distinguishes *Customs Commissioners v. Ingram* [1948] 1 All E.R. 927, where an objection on the ground of self-incrimination was held not to avail against powers to demand the production of documents bearing on liability to purchase tax.

In his dissenting judgment Stanton J. emphasised that no court is justified in introducing limitations into statutes because it thinks, however strongly, that they should be there. He discerned "a growing tendency to accept a more liberal—or, at any rate, a more literal interpretation" of such general words. It may be said, with respect, that these points have particular force in relation to income tax statutes, which are rarely approached in expectation of finding the desirable. Denning L.J. has said in *Birch v. Wigan Corporation* [1953] 1 Q.B. 136, 142: "When there is a fair choice between a literal interpretation and a reasonable one—and there usually is—we should always choose the reasonable one." But somewhat similar observations were described by the Lord Chancellor in the *Magor and St. Mellons Case* [1952] A.C. 189 as "a naked usurpation of the legislative function under the thin disguise of interpretation." Again, the Judicial Committee has held that there is no general principle of construction making general words in a statute capable of authorising the gravest possible inroads upon private rights: *Att.-Gen. for Canada v. Hallet & Carey, Ltd.* [1952] A.C. 427, 451.

Nevertheless the decision in *West-Walker's* case seems unlikely

to meet with much criticism from the legal profession¹; and it is possible to see here a happy coincidence of public and sectional interests. Analogies to the decision may perhaps be found in *Chester v. Bateson* [1920] 1 K.B. 829—a case unfortunately not argued on behalf of the Crown—where the general words of the Defence of the Realm Acts were held not to authorise a regulation prohibiting the taking of certain legal proceedings without the consent of a Minister; and in recent cases where the courts have shown reluctance to allow to others power conclusively to interpret a statutory order (*Barnard v. National Dock Labour Board* [1953] 2 Q.B. 18, 30–32, 43, 47), contractual rules (*Lee v. Showmen's Guild* [1952] 2 Q.B. 329), or a will (*Re Wynn* [1952] Ch. 271). No doubt the courts, reflecting contemporary opinion, have come to set less store by the substantive rights of the individual, particularly rights of property; but the value of effective machinery for the ascertainment and protection of such rights as do exist, emphasised by Dicey, remains unquestioned. Freedom to obtain unhindered the judgment of the ordinary courts or the advice of a legal practitioner has accordingly a claim to especially jealous safeguard by the common law.

R. B. COOKE.

CROWN SERVANTS—IMMUNITY FROM TAXATION

THE leading case on the ambit of Crown immunity from statutes is now *Bank voor Handel en Scheepvaart v. Administrator of Hungarian Property* [1954] 2 W.L.R. 867; and, although there was a sharp conflict of judicial opinion as to the result, there appears to have been a wide measure of agreement as to the principles to be applied. In consequence of the German occupation of Holland a Dutch banking corporation became an enemy within the meaning of the Trading with the Enemy Act, 1939. By an order under that Act the Board of Trade vested in the Custodian of Enemy Property gold owned by the bank and deposited in London. The custodian sold it, invested the proceeds, and paid income tax on the fruits of the investment. In 1950 the investment was transferred, under the erroneous belief that it was the

¹ An identical question would not arise in England because the Commissioners of Inland Revenue have no correspondingly wide general power. But it is interesting that power to require particulars, in connection with the transfer of income abroad, from "any person" was given to the Special Commissioners by the Finance Act, 1937. An "explanation and amendment" of this provision was enacted in the Finance Act, 1939, s. 17, whereby a very limited duty of disclosure is prescribed for solicitors. Cf. Companies Act, 1948, s. 175.

property of a Hungarian, to the respondent. Having recovered judgment against the latter for the capital sum and the accumulated income, the bank contended that tax was not deductible. The issue thus raised turned solely on whether the custodian could have successfully relied on the royal prerogative when charged to tax, for it was not argued that immunity, if available, had been waived. The bank's contention was accepted in the House of Lords by a majority of three to two, reversing the unanimous judgment of the Court of Appeal and restoring that of Devlin J.

It was common ground in the House of Lords speeches that when statutes do not bind the Crown the shield of the Crown may extend to two classes of persons in the performance of their official duties, namely, servants of the Crown and persons *in consimili casu*. Devlin J. had suggested that the description "servant of the Crown" has no longer a precise legal meaning. The House did not share this difficulty. Lord Reid's observations at p. 882 as to the appropriateness of the term recall the words of Dixon J. in *Att.-Gen. for N. S. W. v. Perpetual Trustee Co.* (1952) 85 C.L.R. 237, 249: "The growth of ministerial responsibility for the acts of the Crown has not changed the character of the legal relation to the Crown of the servants of the Crown." The test of the relationship is the degree of control exercised over the official by Ministers. Applying this test, Lords Morton (who dissented), Reid, Tucker and Asquith considered that the custodian was a Crown servant, because under the relevant legislation his discretionary powers were negligible and he was largely subject to the control of the Board of Trade. Thus his position is distinguishable from that of the public boards dealt with in such cases as *Fox v. Government of Newfoundland* [1898] A.C. 667; *Metropolitan Meat Industry Board v. Sheedy* [1927] A.C. 899; and *Grain Elevators Board v. Dunmunkle Corporation* (1946) 73 C.L.R. 70. Lord Keith (who also dissented) thought, however, that the custodian had considerable independence and discretion, and that all that could be said, looking solely at his status, was that he was a statutory official.

It was also common ground that persons are *in consimili casu* and entitled to the immunity in so far as, although not strictly Crown servants, they hold property used exclusively for the purposes of the government of the country. Thus, Crown exemption from rates or income tax has been accorded in respect of county buildings used as assize or county courts, police stations, judges' lodgings, and prisons: see *Mersey Docks v. Cameron* (1865) 11 H.L.C. 443, 464-5, 508, and *Coomber v. Berks Justices* (1883) 9

App.Cas. 61; contrast *Worcester County Council v. Worcester Union* [1897] 1 Q.B. 480, and *Brown v. Smith* (1901) 4 T.C. 435. These examples concern the administration of justice and the preservation of order. Crown servants excepted, it seems that those whose functions do not fall within the sphere of the royal prerogative are not entitled to the immunity unless Parliament clearly indicates an intention in that behalf. Lord Asquith expresses the opinion that "The courts will lean against including in any of the exempted categories an aggregation of commercial undertakings brought under some degree of public statutory control." A Court of Appeal including Asquith L.J. (as he then was) applied this presumption to the British Transport Commission in *Tamlin v. Hannaford* [1950] 1 K.B. 18. It may be added that apparently the Crown may expressly or by necessary implication extend its shield to independent contractors: *Dixon v. London Small Arms Co.* (1876) 1 App.Cas. 632; *Roberts v. Ahern* (1904) 1 C.L.R. 406. If so, the contractor, in performing work for the Crown, is simply acting as its agent by the authority of persons entitled to the immunity.

Finally it was common ground that immunity does not automatically attach to a Crown servant merely because he is acting in the course of his duties. The grade of the servant is not indeed material in itself—there is thus shown to be a potential degree of exemption from the ordinary law which, in the view taken by Professor Glanville Williams in his *Crown Proceedings*, at p. 52, would be "rather disturbing in scope." But it must at least be established that withholding the immunity from the servant might prejudice some Crown interest or purpose. "I am prepared to assume," said Lord Reid, "that if a case arose in which it was the duty of a Crown servant merely to hold property with accruing income for a period and then to pay it to some as yet unascertained private person, it would be held that tax is payable on the income accruing."

At this point the opinions of their Lordships diverged. In determining whether payment of tax would prejudice the Crown the fact that in the upshot the bank had recovered both capital and income was not decisive. The position had to be considered as at the date when the custodian was assessed to tax. The Act of 1939 had provided for the appointment of the custodian "with a view to preventing the payment of money to enemies and of preserving enemy property in contemplation of arrangements to be made at the conclusion of peace." While he held the investment the beneficial interest was suspended: it belonged to no one. In Lord Morton's opinion this alone would have been fatal to a claim

for immunity. Such a claim, he thought, could succeed only if income were wholly and (*semble*) immediately applicable for the purposes of the government of the country. The other members of the House thought it necessary to look further. Lord Keith concluded that after the war the bank had a right to the return of the gold or the investment into which it had been converted: neither the Act nor any prerogative enabled the Crown to make other arrangements with regard to the property of aliens who were not enemy subjects. Lord Asquith held that in pursuance of peace treaties the Crown could equally create a title in anyone else, including itself. Lords Reid and Tucker, while not expressly going to the length of the last proposition, held that the Crown had certainly some wider power of arrangement and disposal than was suggested by Lord Keith. For example, arrangements could be made with an allied government for the disposal of property formerly owned by subjects of that government in terms which did not ensure that each item of property was returned intact to its former owner. They further held that the power to make such arrangements gave the Crown a sufficient interest to invoke immunity if it chose to do so.

The Master of the Rolls and Denning L.J. had agreed that instead of using the common formula that the Crown is not bound by a certain statute it is more accurate to say that the Crown is not to be prejudiced thereby. The House of Lords has endorsed this view; but the majority speeches—and Lord Keith does not appear to differ in principle—have in effect added a gloss to it. In order to invoke the immunity a Crown servant need not show that the threat to the Crown's interests is direct or immediate. This seems an almost inevitable inference. Any inclination to resist it merely because of the curious result of the *Bank voor Handel* case would be irrational. That result was caused basically by an election to rest the argument for the respondent on the single proposition that immunity could not have been accorded to the custodian even if it had been sought.

R. B. COOKE

TRADE UNION—MEMBER'S REMEDY FOR WRONGFUL EXPULSION

WHEN a member of a trade union is improperly expelled from membership, what is the nature of his remedy and against whom is it available? May he sue the trade union itself, and if so, does he proceed in tort or for breach of contract? Alternatively, has he

a cause of action in contract or tort against the individual officer or members of the committee who purported to expel him? *Bonsor v. Musicians' Union* [1954] Ch. 479, C.A., is the latest of a recent series (see, for example, *Lee v. The Showmen's Guild of Great Britain* [1952] 2 Q.B. 329 and *Abbott v. Sullivan* [1952] 1 K.B. 189) in which these questions were raised.

It now seems reasonably clear that wrongful expulsion *as such* is not a tort (*Abbott v. Sullivan*); even if it were, no action could be brought against a trade union because of the Trades Disputes Act, 1906, s. 4 (1) which gives a trade union immunity from such actions even where the tort is unconnected with a trade dispute. Such an action would lie against any individual tortfeasor, but as yet there is no tort and no tortfeasor.

The alternative claim is therefore in contract and here the plaintiff has (at any rate theoretically) a choice both as to remedy and as to defendant. A plaintiff who has been wrongfully expelled from membership is entitled, both as against the union itself and as against such other members who ordered the unlawful expulsion, to a declaration that his purported expulsion is a nullity and to an injunction restraining them from acting upon that unlawful order. But if the plaintiff claims the further remedy of damages for breach of contract, his choice of defendant becomes more material. It is now generally accepted that, in such cases, the rules of the union constitute a contract between the plaintiff and his fellow members (*Baker v. Jones* [1954] 1 W.L.R. 1005); therefore, expulsion otherwise than in accordance with the rules constitutes a breach of contract for which the other members who ordered or authorised it ought personally to be liable. But what is the position if, instead of suing the offending members individually, the plaintiff claims damages for breach of this contract from the union itself? This was the crucial claim in *Bonsor's* case where the secretary of a branch of the defendant union purported to expel the plaintiff from membership. By the rules of the union the power of expulsion was vested in a committee, and the Court of Appeal were therefore unanimous in upholding the decision of Upjohn J., that the plaintiff was entitled to a declaration that his expulsion was wrongful. But the plaintiff claimed not only the declaration, but also damages against the union and the importance of *Bonsor's* case lies in the rejection by a majority of the Court of Appeal (Denning L.J. dissenting) of this claim.

The plaintiff's initial and fundamental difficulty arose from the fact that a similar claim had been rejected by the Court of Appeal in *Kelly v. National Society of Operative Printers' Assistants* (1915)

113 L.T. 1055, and it was necessary therefore to seek to persuade the court that *Kelly's* case was not now binding on them and to this end four grounds were put forward by counsel for the plaintiff.

First, that it was inconsistent with later statements of the House of Lords, particularly in the *Amalgamated Society of Carpenters Case* [1922] 2 A.C. 440. To this the court answered that no question of a claim to damages arose in that case which was concerned only with the right of a member to a declaration and injunction if he was wrongfully expelled.

Secondly, that section 82 of the Law of Property Act, 1925, had destroyed the legal basis of the decision in *Kelly's* case. That section provides that . . . "any agreement entered into by a person with himself and one or more other persons shall be construed and be capable of being enforced in like manner as if . . . the agreement had been entered into with the other person or persons alone." To establish his point counsel sought to show that in *Kelly's* case the plaintiff failed because the court took the view that the contract upon which he was suing was one made between the plaintiff on the one hand, and the other members of the union, *including himself*, on the other hand, and that by seeking to enforce such a contract he was in effect suing himself, which was impossible. The answer given by the majority to this argument is that the *ratio* of *Kelly's* case is based on the view that the contract was between plaintiff and all the other members *excluding himself*; section 82 of the Law of Property Act is therefore irrelevant and has not affected the validity of that decision.

Thirdly, that Scrutton L.J. in *Malone's Case* [1921] 2 K.B. 694 had confessed to being perplexed by *Kelly's* case, saying . . . "the court did grant a declaration and injunction to the plaintiff against himself without apparently seeing that there was any inconsistency" between this and refusing the plaintiff damages against himself. The majority of the court, however, having rejected the second argument, also reject this one on the same ground; namely, that the doubts of Scrutton L.J. are based on a misunderstanding of who are the real parties to the contract. They are of the opinion that in such cases the plaintiff does not obtain a declaration against himself, but against the other members excluding himself, and there is therefore no inconsistency.

Fourthly, that a trade union, by statute and judicial decision, has become a separate legal entity, distinct from its constituent members, and is responsible for the acts of its duly appointed officers. The necessity for this argument arises from the fact that *Kelly's* case in effect decided that the committee who wrongfully

expelled the plaintiff were just as much his agent as the agent of the other members. How then could he complain of something done by his own agent? The majority in *Bonsor's* case accept this situation, but Denning L.J. vigorously dissents, saying: "I cannot understand this line of reasoning. I cannot understand how it can be said that the committee . . . were acting as agents on his behalf. They were acting against him, not for him." But since the majority accept the reasoning in *Kelly's* case, it becomes necessary for counsel to argue that a trade union is no longer a mere unincorporated body, whose agents act on behalf of all members, but has become a distinct *persona juridica* capable of having agents who can act on its behalf and for whose acts the union itself will be liable. This argument Denning L.J. accepts as the basis of his dissenting judgment, relying strongly on the words of Scott L.J. in *National Union of General and Municipal Workers v. Gillian* [1946] K.B. 81, 84; but the majority reject it and say that *Gillian's* case was an action between the union and persons outside its membership as distinct from an action by a member against his union, and that the union may present "a different aspect in its dealings with outside persons from that displayed to its members in relation to its internal affairs" (*per* Evershed M.R. at p. 505). Even so the Master of the Rolls expressed the serious hope that an opportunity might be found for a review of the law on this matter by the House of Lords. This hope may shortly be realised, for it has since been reported that leave to appeal has been granted.

One last point may be made. The action in *Bonsor's* case was in contract for damages against the union. What has not yet been investigated is the likelihood of success of a similar action against the individual members of a committee who ordered the wrongful expulsion. There seems to be no reason why such an action should not succeed subject only to the difficulty of proving the contractual term which has been broken (*Abbott v. Sullivan*) and to the question whether a particular individual is worth powder and shot.

T. C. THOMAS.

CRIMINAL LAW—MURDER OR MANSLAUGHTER—PROVOCATION

IN crimes other than murder the court can take extenuating circumstances, including provocation, into consideration in assessing sentence. But in murder the sentence is fixed and a desire to make some allowance for the effect on the accused of gross provocation

offered to him by the victim can only be met by the use of a formula under which not the sentence but the nature of the crime itself is altered. The Royal Commission on Capital Punishment has said: "The rule of law that provocation may, within narrow bounds, reduce murder to manslaughter, represents an attempt by the courts to reconcile the preservation of the fixed penalty for murder with a limited concession to natural human weakness, but it suffers from the common defects of a compromise" (Cmd. 8932, para. 144). Not only is the doctrine of provocation itself a compromise but so also is the "test of the reasonable man" which the doctrine, in its modern form, embodies. The Royal Commission considered with care a proposal that this test should be abolished. They felt sympathy with the argument that "if the accused is mentally abnormal or is of subnormal intelligence or is a foreigner of more excitable temperament or is for some other reason peculiarly susceptible to provocation, it is neither fair nor logical to judge him by the standard of the ordinary Englishman." But they also recognised the force of the objection by the judges that "it is a fundamental principle of the criminal law that it should be based on a generally accepted standard of conduct applicable to all citizens alike, and it is important that this principle should not be infringed." In the end they compromised openly and unashamedly. The criterion of the reasonable man, they felt, was not strictly applied by the courts, in practice weight was not infrequently given to factors personal to the accused and even where a verdict of murder resulted such factors could be taken into account by the Home Secretary. In the circumstances they did not feel justified in recommending any change in the law. The test of the reasonable man is retained not because it is logical, not because it is wholly satisfactory, but because it is thought that it works better in practice than would a subjective test under which, as Lord Cooper has put it, circumstances might arise in which "a bad-tempered man would be acquitted and a good-tempered man would be hanged, which of course is neither law nor sense."

It is in the light of this attitude to the doctrine of provocation that one must assess the recent decisions in *R. v. McCarthy* [1954] 2 W.L.R. 1044 (the drunken man) and *Bedder v. D. P. P.* [1954] 1 W.L.R. 1119 (the impotent man). In each case the jury was directed in the classic formula of "the reasonable man." No other direction could have been given in view of the earlier decisions of the House of Lords in *Mancini v. D. P. P.* [1942] A.C. 1, and *Holmes v. D. P. P.* [1946] A.C. 588. In each case the jury returned a verdict of murder and it may well be that, although

lip-service was paid to the test of the reasonable man, sober and potent, they felt in *McCarthy* that no reasonable man, even when drunk, would beat another man's head repeatedly on a rough and stony road, causing three or four fractures of the skull, because that other had made indecent suggestions to him; and in *Bedder* that no reasonable man, even if impotent, who was jeered at and perhaps slapped and kicked by a prostitute, would produce a knife from his pocket and after one unsuccessful effort kill her with his second blow. In each case they may well have thought that the violence used bore no reasonable relation to the provocation offered even if allowances were made for the mental or physical idiosyncrasies of the accused. But each case went to the Court of Criminal Appeal on the ground of misdirection and the formal statement of the provocation rules again came under review. In *McCarthy* the Court of Criminal Appeal, being bound by clear authority that an unusually excitable or pugnacious individual is not entitled to rely on provocation which would not have led an ordinary person to act as he did, could hardly do more than add: "We see no distinction between a person who by temperament is unusually excitable or pugnacious and one who is temporarily made excitable or pugnacious by self-induced intoxication." They stated, to clear up doubts arising from Lord Reading's remarks in *R. v. Hopper* [1915] 2 K.B. 431, that "it is in our opinion now settled that apart from a man being in such a complete and absolute state of intoxication as to make him incapable of forming the intent charged, drunkenness which may lead a man to attack another in a manner which no reasonable sober man would do cannot be pleaded as an excuse reducing the crime to manslaughter if death results."

In *Bedder* the Court of Criminal Appeal dismissed the appeal on the ground that "no distinction is to be made in the case of a person who, though it may not be a matter of temperament, is physically impotent, is conscious of that impotence, and therefore mentally liable to be more excited unduly if he is 'twitted' or attacked on the subject of that particular infirmity." This was consistent and no doubt inevitable but the Attorney-General courageously gave his *fiat* so that the following general point of law could be argued before the House of Lords. Even though, in considering the reaction of the hypothetical reasonable man to the acts of provocation, the jury must be told not to invest him with the mental or temperamental peculiarities of the accused, ought they not to be told that the reasonable man should be invested with the accused's peculiar physical qualities? In the particular

case, ought not the jury to have been directed to consider what would be the reaction of the impotent reasonable man in the circumstances? A unanimous House of Lords (the Lord Chancellor, Lords Porter, Goddard, Tucker and Asquith) held that the answer was no. "It would be plainly illogical not to recognise an unusually excitable or pugnacious temperament in the accused as a matter to be taken into account but yet to recognise for that purpose some unusual physical characteristic, be it impotence or another. Moreover, the proposed distinction appears to me to ignore the fundamental fact that the temper of a man which leads him to react in such and such a way to provocation, is or may be itself conditioned by some physical defect. It is too subtle a refinement for my mind or, I think, for that of a jury to grasp that the temper may be ignored but the physical defect taken into account" (Lord Simonds L.C., at p. 1123). The difficulty is again largely one of words. The jury must, of course, recognise that there are some things which can be done to one man and not to another. A clean-shaven man cannot be dragged down stairs by his beard; a two eyed man cannot be enraged by an attempt to gouge out his only eye; a two-legged man cannot be hit on the head with his own artificial limb. These things, all of which have happened though not in the law reports and not in murder cases, can only be done to bearded, one-eyed or one-legged men. But the reactions of such individuals should, it seems, be tested by the standard of an ordinary individual subjected to comparable pain and insult. No *extra* allowance is to be made for a more violent reaction due to the physical defect. The proposition suggests new difficulties and we might have been helped by a more detailed analysis of these difficulties by the House of Lords. But as in so many other branches of English law the difficulties of stating the rule are frequently greater than the difficulties of applying it; miscarriages of justice are not likely to result.

In *English Law and the Moral Law* Dr. Goodhart has pointed out—and Mr. Justice Devlin has quoted him (see [1954] Crim.L.R. 661-86)—that "it is important that we should realise that part of the price we pay for the death penalty is inevitable confusion in the law relating to the legal responsibility of those who have a disease of the mind." Another part of the same price is the unsatisfactory doctrine of provocation. But so long as the death penalty continues the doctrine must, in practice, be worked as a compromise, despite the difficulties of expounding it rationally.

F. J. ODGERS.

CRIMINAL LAW—EVIDENCE OF ACCOMPLICES—CORROBORATION

IN *Davies v. Director of Public Prosecutions* [1954] 2 W.L.R. 343, the House of Lords considered the scope and legal effects of the rule as to warning the jury with regard to the evidence of accomplices as laid down by a full Court of Criminal Appeal in *R. v. Baskerville* [1916] 2 K.B. 658. The rule laid down in *R. v. Baskerville* (at p. 663) was as follows:

“There is no doubt that the uncorroborated evidence of an accomplice is admissible in law. But it has long been a rule of practice at common law for the judge to warn the jury of the danger of convicting a prisoner on the uncorroborated testimony of an accomplice or accomplices, and, in the discretion of the judge, to advise them not to convict upon such evidence; but the judge should point out to the jury that it is within their legal province to convict upon such unconfirmed evidence. This rule of practice has become virtually equivalent to a rule of law, and since the Criminal Appeal Act came into operation this court has held that, in the absence of such a warning by the judge, the conviction must be quashed.” In *R. v. Beebe* (1925) 19 Cr.App.R. 22, 25, and *R. v. Cleal* [1942] 1 All E.R. 203, 205, the Court of Criminal Appeal had emphasised that the rule as stated in *R. v. Baskerville* involved three things, *i.e.*, it is for the judge (1) to tell the jury that it is within their legal province to convict upon the uncorroborated evidence of an accomplice; (2) (and this is a rule to be observed and applied in all cases) to warn the jury of the dangers of convicting a person on the uncorroborated testimony of an accomplice or accomplices; and (3) in the exercise of his discretion to advise the jury not to convict.

The questions before the House of Lords in *Davies v. D. P. P.* can be summarised as follows:—(1) What is the effect of failure to comply with the rule as to warning the jury, and in particular must a conviction be quashed unless the warning has been given even if there were ample corroborative evidence? (2) Who is an “accomplice” for the purposes of the rule?

The appellant, Davies, was one of a gang of youths, who attacked with their fists other youths, one of whom died from wounds inflicted by a knife used in the fight. The charge of murder against Davies was based on evidence that he alone had possessed and used a knife. Five other youths in the gang with Davies had been charged with murder, but as regards four of them, including one Lawson, the Crown had offered no evidence, and a formal verdict of “Not guilty” on that issue had been returned

by the jury. The four, including Lawson, had pleaded guilty to common assault relating to their part in the fight, out of which the death by knife wounds had arisen. Davies was convicted of murder, and there was evidence concerning his possession and use of a knife apart from evidence given by Lawson, but Lawson had given important evidence for the prosecution at Davies' trial as to statements by Davies concerning the use of a knife, and the trial judge had not given a warning to the jury in relation to the evidence of Lawson. The main grounds of appeal were that the trial judge had not given the warning which was appropriate and necessary in relation to the evidence of Lawson whom it was contended was a witness who should be treated as an accomplice; that there was an inflexible rule of law calling for such a warning; and that as it was not complied with the conviction should be quashed.

The House of Lords approved the rule in *R. v. Baskerville*, and stated that the following propositions, with particular emphasis on the third, now accurately formulated the law:—

- (1) In a criminal trial where a person who is an accomplice gives evidence on behalf of the prosecution, it is the duty of the judge to warn the jury that, although they may convict upon his evidence, it is dangerous to do so, unless it is corroborated.
- (2) This rule, although a rule of practice, now has the force of a rule of law.
- (3) Where the judge fails to warn the jury in accordance with this rule, the conviction will be quashed, even if in fact there be ample corroboration of the evidence of the accomplice unless the appellate court can apply the proviso to section 4 (1) of the Criminal Appeal Act, 1907.

With regard to the application in relation to the above rule of the proviso to section 4 (1) of the Criminal Appeal Act, 1907, (*viz.*, that the court may, notwithstanding that they are of opinion that the point might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred) the House of Lords *obiter* approved the propositions that, if the warning be omitted, the conviction can only stand (1) if there exists corroborative evidence of such a convincing, cogent and irresistible character that a reasonable jury if they had received the proper warning would inevitably have arrived at the same conclusion (*cf. R. v. Lewis* (1937) 26 Cr.App.R. 110), or (2) if the trial has been conducted from first to last on the basis that the issue is whether the evidence of the accomplices was confirmed

by other evidence and a reasonable jury, if the warning had been given, would inevitably have arrived at the same conclusion (*cf. R. v. Davies* (1930) 22 Cr.App.R. 33).

For the purposes of the rule as stated in the three propositions above, the following categories of witnesses are or must be treated as accomplices :—

(a) persons who are *participes criminis* in respect of the actual crime charged; in felonies as principals or accessories before or after the fact, or in misdemeanours as persons committing, procuring, or aiding and abetting;

(b) receivers in relation to the thieves from whom they receive the goods on the trial of the thieves for larceny;

(c) accomplices in other similar crimes when evidence of these crimes is admitted against the accused under the “similar facts” rules.

In the case in question it was held that as Lawson was not a *particeps criminis* in the crime charged, a warning was not essential within the rule as above laid down. There was no reason why “if half a dozen boys fight another crowd and one of them produces a knife and stabs one of the opponents to death, all the rest of his group should be treated as accomplices in the use of the knife, and the infliction of a mortal injury by that means, unless there is evidence that the rest intended or concerted or at least contemplated an attack with a knife by one of their number, as opposed to a common assault. If all that was designed or envisaged was a common assault and there was no evidence that Lawson, a party to that common assault, knew that any of his companions had a knife, then Lawson was not an accomplice in the crime consisting of its felonious use.”

It must be emphasised that although the above must now be taken as the authoritative pronouncement on the rule of law in relation to the giving of the warning and the application of the proviso to section 4 (1) of the Criminal Appeal Act, 1907, nevertheless in relation to the evidence of (a) one who is not an accomplice as so defined but whose evidence may reasonably be considered suspect or tainted, *e.g.*, in that he is involved in some way in the criminal transaction as Lawson was here, or (b) an accomplice who as a co-defendant gives evidence in his own defence, *e.g.*, *R. v. Barnes & Richards* (1940) 27 Cr.App.R. 154, *R. v. Rudd* (1948) 23 Cr.App.R. 138, 143, it will no doubt remain a rule of practice that the judge should in his discretion give a warning concerning the treatment of that evidence. In such cases inasmuch as the degree and gravity of the complicity may vary, and the weight of the uncorroborated

testimony may vary, so will the necessity for or the degree or gravity of the warning to be given vary (*cf. Att.-Gen. v. Lineham* [1929] Ir.Rep. 19).

A. LI. ARMITAGE.

TORT—TRESPASS, NUISANCE, NEGLIGENCE

Southport Corporation v. Esso Petroleum Co. (Devlin J. at first instance [1953] 3 W.L.R. 773; Singleton, Denning and Morris L.JJ. in the Court of Appeal [1954] 3 W.L.R. 200) raises, on facts of tolerable simplicity, as nice a group of problems as could have occurred even to a Tripos examiner of exercised ingenuity.

The defendants owned a tanker carrying heavy fuel oil. Whilst navigating in the Ribble Estuary in moderately bad weather, but with no other ship near enough to disturb her, she stranded herself on an underwater revetment wall in circumstances which were matter of dispute. The tanker was in considerable peril of breaking her back, with probable loss of life. The master decided—as it was found, rightly—to lighten ship by discharging his cargo. He accordingly deliberately pumped about 400 tons of oil into the estuary. So lightened, the tanker was carried bodily over the revetment wall and came to rest on a bank of sand. The tanker and the crew were saved. The oil, as it was evident that it would, deposited itself on the foreshore belonging to the plaintiffs and also into a marine lake which was a feature of the foreshore: to the great damage of the plaintiffs.

The point at issue was: who should pay the considerable cost of removing the oil in these circumstances deliberately discharged by the defendants? All the judges seemed to have believed that a conscientious defendant in some sense “ought” to pay. But only two (Singleton and Denning L.JJ.) concluded that he could legally be obliged to do so: Devlin J. entered judgment for the defendants at first instance and Morris L.J. considered that that decision was correct.

The plaintiffs framed their pleadings so as to raise causes of action in trespass, nuisance and negligence. Devlin J. on balance (pp. 776–7) and Morris L.J. more firmly (p. 217) thought that the action in trespass was competent. Denning L.J. (p. 210) categorically denied that an action in trespass would lie. Singleton L.J. expressed no opinion. It is respectfully submitted that probably the defendants sufficiently directly deposited the oil upon the plaintiffs’ foreshore to have been suable in trespass; and also

that it is quite fantastic that this sort of point should today be seriously litigated in England.

As regards nuisance: counsel for the defendants argued that no action could lie for private nuisance unless the nuisance emanated from land in the occupation of the defendant. Devlin J. categorically denied this (p. 776). Morris L.J. seemed (p. 217) to agree with Devlin J. Singleton L.J. expressed no opinion. Denning L.J. stated (p. 210) that "in order to support an action on the case for a private nuisance the defendant must have used his own land or some other land in such a way as injuriously to affect the enjoyment of the plaintiff's land." Devlin J. has the advantage of agreeing with Winfield (4 C.L.J. at p. 196, and *Tort*, 5th ed., p. 464) with Pollock (*Torts*, 15th ed., 324) and with Salmond (*Torts*, 11th ed., p. 263). The case cited by Denning L.J.—*Sedleigh-Denfield v. O'Callaghan* [1940] A.C. 880—decides that an occupier may in certain circumstances be liable in nuisance for the act of a trespasser: it does not seem to have decided that the trespasser could not also be liable.

As regards public nuisance, Devlin J. and Denning and Morris L.JJ. all seem to be agreed that an action could be framed upon this ground. Devlin J. however held (p. 778), applying Lord Blackburn's dicta concerning traffic on the highway, that "owners whose property adjoins the sea, equally with owners whose property adjoins the highway, take the risk of damage being done by users of the sea or of the highway who are exercising with due care their rights of navigation or of passage"; and that therefore—*quod non sequitur*—whether the action was in trespass or in nuisance or in negligence, the end-result was the same—namely that the plaintiffs to succeed would have to prove that the defendants had been negligent.

Morris L.J. seems expressly to agree with Devlin J. at p. 217, but at p. 218 appears to suppose that by proper pleading the burden of proof might have been put upon the defendants. Denning L.J. held (p. 211) that "in public nuisance, as in trespass, the legal burden shifts to the defendant and it is not sufficient for him to leave the matter in doubt. He must plead and prove a sufficient justification or excuse"—which in the instant case would amount to a proof of inevitable accident. That proof having evidently not been discharged, Denning L.J. was willing without more to hold the defendants liable (p. 213).

The result preferred by Denning L.J. is not, I think, unreasonably preferred. Winfield and Goodhart were of opinion (49 L.Q.R. 359, 376) that despite Lord Blackburn's dicta, the historical

authority previous to 1866 was in favour of putting the burden of proof of inevitable accident upon the defendant even in accidents on the highway—I venture to add, when it can be shown that the defendant collided with the plaintiff rather than that the plaintiff obstructed the defendant: for the proof of the mere invasion (in the instant case easy enough) may itself require proof of negligence. But to put the burden of disproof on the defendant even in an action based upon public nuisance is today a rather startling proposition (see, e.g., *Wing v. L. G. O. C.* [1909] 2 K.B. 652, *Maitland v. Raisbeck* [1944] K.B. 689). The authority cited by Denning L.J.—*Tarry v. Ashton*, *Wringe v. Cohen* (which were cases of *res suspensae*) and *Sadler v. South Staffordshire and Birmingham District Steam Tramways Co.* (on any view a very old case)—is markedly unsatisfactory. Nor is it reassuring that Denning L.J. adds (p. 212) “to take a modern instance, if a cricketer hits a ball out of the ground and it falls on to the head of someone walking along the road—or on to someone’s greenhouse—he is liable in trespass. He could not hope to show that it was an unavoidable necessity for him to hit the ball so hard.” For most persons, this would seem to be *obscurum per obscurius*; for, though in *Bolton v. Stone* [1951] A.C. 850, the action was against the club and not the cricketer, that case is on the whole unfavourable to the proposition.

If there was thus some divergency of views about trespass and nuisance, there was a good deal more on the topic of negligence. All the judges were agreed that if the tanker got herself upon the revetment wall by reason of her previous negligence, then she was responsible for the damage caused by the oil deliberately pumped out even if the pumping was necessary to save life. But there agreement ended.

Denning L.J. was of opinion (pp. 213–4) that *The Merchant Prince* [1892] p. 179, established a special exception to the rule that in an action for negligence the burden of proof is on the plaintiffs and held that the instant case fell within that exception. Accordingly, the defendants not having proved that they were not negligent, judgment should be for the plaintiffs, even if the action were in negligence. Devlin J. did not find *The Merchant Prince* an easy case to apply and “if he had to rely upon his own judgment, would not have been able to appreciate” the distinctions drawn in later cases; but he felt himself entitled to hold that *The Merchant Prince* point, whatever it was, had not been raised on the pleadings. The pleadings, in his opinion, raised a question

only as to the master's negligent navigation and not as to the condition of the ship at the start of the voyage. Even after applying in the plaintiffs' favour the doctrine of *res ipsa loquitur*, but without the complications, if any, arising from *The Merchant Prince*, Devlin J. held that the plaintiffs had failed to prove negligence in the navigation and there must therefore be judgment for the defendants. Morris L.J. agreed that *The Merchant Prince* point did not arise upon the pleadings. He was of opinion that in any event that case was applicable only to a collision in fair weather and by daylight of one ship under way with another at anchor. He further agreed that the burden remained on the plaintiffs to prove negligence and that on the facts they had failed to do so. Singleton L.J. agreed with Devlin J. and Morris L.J. that (p. 209) "it is on the issue of negligence that the case falls to be decided." He was, however, of opinion that on the pleadings all the circumstances of the stranding (and not merely the question of the master's negligent navigation) were open to consideration. He nevertheless was unwilling to suppose that *The Merchant Prince* altered the established rule that the burden of proof in an action for negligence is on the plaintiff; but, applying the normal *res ipsa loquitur* principle, he found as a fact that the plaintiffs had made out a *prima facie* case which had not been sufficiently answered. Although Denning L.J. was, as we have seen, willing to decide the case upon other grounds, he also expressly agreed with Singleton L.J.'s views.

It may therefore be that *Southport Corporation v. Esso Petroleum Co., Ltd.*, as a matter of law decides only the adequacy of a particular set of pleadings and the view to be taken of the balance of probabilities in a special set of facts; but seldom can a court have started, with such little profit, so many and such controversial legal queries.

I must declare my sympathy with the result at which Denning L.J. aimed: in cases of this sort, the burden of proving inevitable accident should be put upon the defendant, whatever might have been one hundred years ago the appropriate form of action. The French law on this subject is much more sensible—in road accidents at any rate, it quite clearly puts at least this degree of duty upon the controller of the vehicle. It would be sad to think that the state of the common law is now such that a reasonable result can only be attained at the cost of the kind of confusion which attended this case.

C. J. HAMSON.

DECEIT—VICARIOUS LIABILITY—MISREPRESENTATION PRECEDING
APPOINTMENT OF AGENT

Briess v. Woolley [1954] 2 W.L.R. 832, H.L., was a case in which appellants and respondents were innocent parties, one of whom had to suffer the consequences of fraud. In such cases it is more than ever important that the rules of law should be strictly applied without regard to hardship.

The respondents were the executors of a former shareholder in a company licensed to manufacture cream in accordance with a formula. Unknown to anyone, Rosher, the managing director, disregarded the formula, watered the cream and, for a time, increased the profits. In 1948 he began negotiations with the plaintiffs, who were interested in acquiring the shares of the company, showing them the accounts but failing to disclose the true condition of the business. Eventually a general meeting of shareholders was told of the negotiations and of a "proposition" from the plaintiffs, and a minute recorded the decision that Rosher "should take the matter up further with (them) with a view to completing the transaction on the above basis." The plaintiffs bought the shares, discovered the fraud, and brought an action for damages against the defendants.

Barry J. held the shareholders liable for Rosher's deceit, and ordered contribution, in proportion to their holdings, from other former shareholders joined by the defendants. The Court of Appeal reversed this decision (which Romer L.J. considered would be "disastrous": [1953] 2 W.L.R. at p. 615) on the ground that the decision in general meeting was no more than the appointment of Rosher as agent to accept the plaintiffs' offer, without authority to negotiate, and that in the absence of full knowledge there could have been no ratification of his misrepresentations. The House of Lords took a different view as to the nature of the agency. In their eyes it included authority to negotiate. Clearly that was enough to render the defendants liable for any express misrepresentations made fraudulently by Rosher after the meeting. Lord Oaksey found evidence of this and decided the case on that ground. The rest of their Lordships, Lord Reid (with whom Lord Asquith agreed) and Lords Tucker and Cohen, were not able to discover such evidence. They, however, held the respondents vicariously liable for the fraudulent misrepresentations originating from Rosher's activities before his appointment.

Two simple propositions were used by their Lordships to solve this novel problem: first, a principal is liable for the fraud of his

agent committed within the scope of the agency; secondly, the tortious act of deceit is "complete" when the misrepresentation is acted upon and not before, such misrepresentations "continuing" until they are, as it were, crystallised by the act of the representee. The scope of the agency depended here on the view taken of the appointment, and the case largely turned on that question of fact. Rosher had always been engaged on the very negotiations for which he was ultimately appointed; and whether he made the misstatements for his own purposes was of course irrelevant (*Lloyd v. Grace Smith & Co.* [1912] A.C. 716). The second proposition is in one sense untrue; for the cause of action is not "complete" until damage is suffered, and this may occur after the act induced (as Lord Tucker recognises, at p. 845). What is meant here is that the misrepresentation is so completed by the act that that moment is the one relevant to inquiry into its falsity (*Ship v. Crosskill* (1870) L.R. 10 Eq. 73). Until then the representation continues, or is in law repeated, a notion well supported by general statements in the cases, of which their Lordships cite *Smith v. Kay* (1859) 7 H.L.C. 750, 769 and *Melhuish v. Milton* (1876) 3 Ch.D. 27, 35 (cf. *Shaw v. Shaw* [1954] 3 W.L.R. 265 at 272-3).

This sort of problem seems previously to have arisen only in relation to the question whether a person who discovers, after his representation, either that it has always been untrue or that events have made it false, is liable in damages if he does not correct it before it induces action. Considerable authority can be found for the view that he is liable; for instance *Brownlie v. Campbell* (1880) 5 App.Cas. 925, 950; *With v. O'Flanagan* [1936] Ch. 575, 584; *Bradford, etc., Building Society v. Borders* [1941] 2 All E.R. 205, 220. The speeches in *Briess v. Woolley* inferentially lend support to that conclusion. But this was a case of a tortfeasor fraudulent *ab initio*. To say that the misrepresentation continued places the misrepresentation within the ambit of the subsequent agency. But does it so place the fraud? Is the continuation of the agent's fraudulent state of mind an essential part of the decision? Certainly all the speeches make mention of Rosher's continued knowledge that the plaintiffs remained under the influence of his fraud. Lord Oaksey and Lord Reid thought it important; Rosher throughout "knew perfectly well" (p. 837) that the plaintiffs relied on him, and "continued to conceal the true facts" (p. 842). Lord Tucker touches on the point (p. 846) and Lord Cohen twice insists (p. 850) that Rosher was guilty of a "fraudulent failure" to disclose. This phrase conceals the problem. Must the failure be a

dishonest failure? Or is failure in itself fraud, in view of the antecedent fraudulent misrepresentation? The speeches seem to suggest the former solution. This is, perhaps, by analogy with the case where the statement is first made innocently; there the subsequent discovery necessarily means dishonesty if there is no disclosure, and evidence of that later state of mind is essential to prove fraud. But in our case, if the tort is complete only when the misrepresentation succeeds in inducing action (see especially *per* Lord Tucker at p. 845) and the wilful misrepresentation is notionally repeated until then, it is not so clear that the subsequent mental condition of the tortfeasor should be considered. The tortfeasor will not be interested in this difficulty; but it may be critical for the principal who appoints him agent in the middle of the process. Suppose that Rosher had made the original representations in entirely different transactions. Had he dishonestly concealed the truth later, the result must have been the same. And if he had by then forgotten, would not his principals have been liable?

Whatever may be the correct answers to these questions, the wise principal will, before appointing his agent, now investigate carefully his past utterances and demand a clean record of representations. Shareholders in general meeting who find this course distasteful or impossible, should give to the directors negotiating with the bidder power only to accept his offer, or report his comments. They will then escape. Buyers of the shares will, it seems, be left with a remedy only against the tortfeasor; for even if they establish that he acted as agent for the company (which is most unlikely), they will not be able to recover damages against the company while they remain members (*Houldsworth v. City of Glasgow Bank* (1880) 5 App.Cas. 317).

K. W. WEDDERBURN.

CONTRACT—EFFECT OF WAR ON BANKING ACCOUNT

As a general rule war abrogates executory contracts which require intercourse across the line of war. There are, however, certain exceptions. As Lord Dunedin said in the *Ertel Bieber Case* [1918] A.C. 260, 267: "There is indeed no such general proposition as that a state of war avoids all contracts between subjects and enemies. Accrued rights are not affected, therefore the right of suing in respect thereof is suspended. . . ." Is a credit balance on a current account such an accrued right? This was the short point of the House of Lords' decision in *Arab Bank, Ltd. v. Barclays Bank* [1954] 2 W.L.R. 1022.

The appellants were formerly incorporated in Palestine, having their head office at Jerusalem. In 1939 they had opened a current account with Barclays' branch at Allenby Square, Jerusalem; they were now suing for repayment of their credit balance of £582,931 3s. In the meantime, however, there had been great changes in Palestine. The announcement of the end of the mandate (it ended at midnight May 14-15, 1948) had precipitated large scale hostilities between Arab and Jewish forces. Jerusalem was divided, the Arabs holding the old walled city, the Jews the new city outside the walls. The Arab Bank was in the old part, but eventually moved to Amman and became registered there. Barclays' Allenby Square branch was occupied by Jewish forces until the Armistice of April 3, 1949, but was eventually reopened in July, 1950; it was then within the territory of the new State of Israel, which had been recognised by His Majesty's Government the previous April. Three decrees of the Provisional Government of Israel were in point: the first provided that the law which existed in Palestine on May 14, 1948, *viz.*, English law, should remain in force so far as it was not repugnant to enactments of the Government; the second continued in force regulations making it unlawful for anyone in Israel to make a payment, unless by licence, to a person outside Israel; the third provided that the property of "absentees" (those who had left the territory after November 29, 1947) vested in a custodian. In 1951 the respondents, on demand from this Custodian of Absentees' Property, paid to him the credit balance standing in the name of the Arab Bank.

The appellants were in a difficulty. They must avoid any claim based on their original contract: for a contract of current account creates an obligation to pay a debt on a demand at the place where the account is; consequently, any rights arising from the appellants' contract were fettered in Jerusalem and indisputably governed by Israeli law, which both made it illegal to pay the appellants and required payment to the custodian. So the appellants began their argument with the proposition that their contract with the respondents, being an executory contract, had been abrogated, or at any rate frustrated, by the war. (It was common ground that in this matter Israeli law was the same as English law.) Now if the contract was frustrated, it was very arguable from the decision in the *Fibrosa Case* [1943] A.C. 32 that the appellants had an action for money had and received; and, moreover, that this remedy was not located in Israel, that it was not affected by Israeli decrees, and that the natural place for its discharge was at the respondents' headquarters in London.

To this the respondents replied that the debt created by the original contract was not destroyed by the war at all, but was an accrued right of the kind referred to in the *Ertel Bieber* case; for if the original contractual right was preserved from destruction, there could be no question of a quasi-contractual remedy. The appellants countered that the credit balance could not be an accrued right, relying on the decision in *Joachimson v. Swiss Bank Corporation* [1921] 3 K.B. 110 that "a customer must make a demand at the branch where his current account is kept before he has a cause of action against the bank." No such demand had ever been made in the present case (Parker J. had found this as a fact). Therefore, there was no existing cause of action on the current account; and, it was very reasonably argued, a right which did not carry with it an existing cause of action was not an accrued right.

There was no case directly in point but their Lordships felt that their decision in *Schering v. Stockholms Enskilda Bank Aktiebolag* [1946] A.C. 219 leaned strongly against the appellants. There it was held that future instalments not yet due for payment might survive the war; yet clearly there could have been no existing right of action for future instalments. Moreover, the right to the credit balance was a property right, which for example the creditor could assign, or bequeath in his will and it passed on his intestacy. So they decided that the debt in the current account was an accrued right, and approved the words of Jenkins L.J. in the court below that: "Once the exception of accrued rights is accepted, and once the basis of it, viz., that the law in its concern to prevent benefit to enemies does not go to the length of confiscating enemy property, is recognised, I see no reason in principle why a debt for the recovery of which some formality, such as a demand for payment or the production of some *indicia* of title, is made requisite, should on that ground be excluded from the benefit of the exception." All the judges approved and relied on the words of Sir Arnold McNair (*Legal Effects of War*, 3rd ed., p. 93) that the effect of war on a contract was to "abrogate or destroy any subsisting right to further performance other than the right to the payment of a liquidated sum of money, which will be treated as a debt and will survive the outbreak of war."

The Court of Appeal had seemingly been impressed by a submission of the respondents that, even had the appellants carried their point that the contract of current account was wholly destroyed by the war, they had still not escaped from their dilemma; for if a payment under the contract was illegal, would not a payment in quasi-contract also be illegal? But this superficially attractive

argument is surely fallacious. The action in quasi-contract, as the appellants strenuously argued, was entirely different from the contractual obligation, in that it would not be one located in Israel, and if it was not located in Israel, it would not involve a payment across the line of war nor be affected by Israeli decrees about absentees' property. Admittedly the argument is not unassailable; but to say that *because* the payment in contract is illegal the payment in quasi-contract also is illegal is a *non-sequitur*.

Indeed, the only conclusive answer to the appellants' argument was that given in the House of Lords: that the question of the effects of frustration does not arise because the debt is *initially* an accrued right. That being so there could be no action for money had and received because there was no unjust enrichment. Lord Reid put the matter very clearly, showing the relationship between "accrued right" and "frustration." It was true, he said, that under their contract the appellants had to go to Allenby Square and ask for payment of their balance; but there was an existing debt, and this was "quite different from a case where one party still has to perform some service or fulfil some obligation under the contract in order to earn the money. In such a case further performance of such contractual obligation being prevented by frustration that party can never do what is necessary to earn the money and so can never acquire a right to have it paid to him; nothing was owing to him when the war broke out, so there is no 'accrued right' to suspend."

R. Y. JENNINGS.

COMPANIES DISSOLVED ABROAD—WINDING UP IN ENGLAND

MORE than thirty years after the nationalisation and subsequent dissolution of all Russian banks, Wynn-Parry J. in *Re Azoff-Don Commercial Bank* [1954] Ch. 315 may be said to have determined finally how the assets in England standing in the name of Russian banks are to be distributed. It may seem surprising that these assets, some of them of considerable value, were not disposed of earlier, but a number of factors, some factual, some procedural and some touching upon points of substantive law, obscured and delayed the issue. At first, it was not clear whether the Russian banks had in fact been dissolved, or whether the process of liquidation was still continuing: *Russian Commercial and Industrial Bank v. Comptoir d'Escompte de Mulhouse* [1925] A.C. 112. When it had become evident that they had been dissolved (*Lazard Brothers*

v. *Midland Bank* [1933] A.C. 289) the next question was how the assets in England were to be collected. A company incorporated abroad, which has been dissolved according to the law of the place of incorporation, cannot sue in England: *Russian and English Bank v. Baring Brothers* [1932] 1 Ch. 435. New winding-up proceedings must be instituted in England, and the liquidator appointed in these proceedings is entitled to bring actions in the name of the dissolved company, which is thus revived, or kept alive, for the purpose of winding up in England: *Russian and English Bank v. Baring Brothers* [1936] A.C. 405. The next question was in what circumstances English courts have jurisdiction to wind up such companies. Little difficulty arises where the company has established a place of business in England and is registered under Part X of the Companies Act, 1948 (formerly Part XI of the Act of 1929) as an overseas company. But where the company has no established place of business in England, it falls to be treated as an unregistered company which may be wound up in the circumstances set out in sections 399 and 400 of the Companies Act, 1948. Here the crucial question is whether the company must have carried on business in England. The Court of Appeal in *Banque des Marchands de Moscou (Koupetschesky) v. Kindersley* [1951] Ch. 112 decided that it was sufficient if there are assets in England and persons subject, or at least submitting, to the jurisdiction. It is doubtful whether this view is supported by previous authority or by the wording of the Companies Act (see (1952) 11 C.L.J. 198-208), but it is justified in the particular circumstances where the banks were dissolved in Russia by a process other than an ordinary winding up. As was pointed out in the article cited above, the only alternative is to treat the assets as *bona vacantia* within the meaning of section 354 of the Companies Act, 1948, but this means that any outstanding claims cannot be settled as of right. This point was taken up by the Crown in *Re Banque Industrielle de Moscou* [1952] Ch. 919, where the winding-up order provided: "And this Order is without prejudice to the claim of the Crown to any of the assets of the said company which may have become *bona vacantia*." The Crown contended that the winding-up proceedings were subject to the overriding claim of the Crown to all the assets as *bona vacantia*. Wynn-Parry J., rejecting this contention, had little difficulty in showing that this interpretation of the order was inconsistent with the other terms of the order itself. Consequently, when in *Re Azoff-Don Commercial Bank* certain Norwegian creditors of the bank lodged a petition to wind up the bank on the ground that it had been dissolved in Russia and that assets were located in England, the Crown was

driven to contend, in the first place, that the assets had vested in the Crown as *bona vacantia* and that the court had no jurisdiction whatever to wind up the company, except with the consent of the Crown. Wynn-Parry J., relying upon *Att.-Gen. v. De Keyser's Royal Hotel* [1920] A.C. 508, held that the Companies Acts had cut down the prerogative of the Crown. The right to *bona vacantia*, preserved in section 354, was subject to the provisions for the winding up of foreign unregistered companies contained in sections 399 and 400. Moreover, according to section 404, the general rules for winding up English companies were applicable: *Rudow v. Great Britain Mutual Life Assurance Society* (1881) 17 Ch.D. 600. As regards the latter, it was clear that the prerogative of the Crown had been limited: *Re H. J. Webb & Co. (Smithfield, London), Ltd.* [1922] 2 Ch. 369, affirmed *sub nom. Food Controller v. Cork* [1923] A.C. 647. Having disposed of the claim of the Crown by an argument based upon the construction of the Companies Act, Wynn-Parry J. relied, by way of a second argument, on a comparison between the right of the Crown to *bona vacantia* of a person dying intestate without next-of-kin, and to *bona vacantia* of a dissolved company. In both cases the Crown takes the property after payment of debts. The only difference is that, in the first case, the Crown obtains letters of administration and then pays the debts, while in the second case the company is not dissolved, and the Crown does not take, until the company has been wound up: *Re Wells* [1933] Ch. 40, at p. 50, per Lawrence L.J. In the opinion of Wynn-Parry J. the provisions of the Companies Act dealing with the winding up of foreign unregistered companies (sections 399, 400) would cease to have any meaning if the Crown could assert an overriding claim to the assets. Yet this is only true if English courts have jurisdiction to wind up the foreign unregistered company, and the Crown contended, therefore, in the second place, that English courts have no jurisdiction if the foreign company did not carry on business in England. Following the decision of the Court of Appeal in *Banque des Marchands de Moscou (Koupetschesky) v. Kindersley* (discussed above), Wynn-Parry J. denied the relevance, for the purpose of winding up, of the fact whether the company had carried on business in England or not. In view of the observations made above, it is unnecessary to comment upon this part of the judgment.

In the third place, resuming in a modified form a possible distinction put forward in (1952) 11 C.L.J. 198, at p. 208, between winding up upon the petition of creditors whose claims arose out of business transactions outside the United Kingdom and other

petitions, the Crown contended that the court should not exercise its discretion to wind up the company, seeing that the only creditors were foreign nationals and that the debts were payable abroad. (As regards debts situated in Russia, see *Re Banque des Marchands de Moscou (Koupetschesky)* (No. 2) [1954] 1 W.L.R. 1108, at pp. 1112 *et seq.* and the cases cited there.) Wynn-Parry J. rejected this contention by reference to the well-known maxim that in English courts foreign and English creditors are treated on an equal footing: *Re Kloebe* (1884) 28 Ch.D. 175, 180. Without wishing to belittle the far-reaching value of this maxim which applies, however, only if English courts have jurisdiction and if there are English creditors who may avail themselves of it, it may be pointed out that in *Re Kloebe* Pearson J. was concerned with the administration of the estate of a *de cuius* who had died domiciled abroad. This is governed by the *lex fori*. The Bankruptcy Act, 1914, s. 4 (1) (d) restricts the right of creditors to lodge a petition in bankruptcy, unless the debtor is domiciled in England, or has certain residential qualifications or has carried on business in England. It must be admitted that the position of the Russian banks is unique, inasmuch as no winding-up proceedings can be taken abroad at the place of incorporation. The position may therefore be compared with that of a person dying intestate abroad without next-of-kin and without assets, in which case letters of administration can be taken out in England if there are assets here. Whatever the general implications of the present decision may be, it cannot be doubted that it is just and equitable where a company incorporated abroad has been nationalised and dissolved without payment of compensation and without a process of winding up. If the Crown were to take the property in England of such companies as *bona vacantia*, without a previous process of winding up in England where all claims against the company may be proved, it would become not only a beneficiary of, but an accomplice to, foreign measures of confiscation. Yet even as the law stands today, the claims of the shareholders are passed over together with claims of creditors which are payable in Russia and governed by Russian law.

K. LIPSTEIN.

TRUST—COURT'S JURISDICTION TO MODIFY TERMS

Chapman v. Chapman [1954] 2 W.L.R. 723, H.L., was concerned with the inherent jurisdiction, which equity judges have exercised for many years, to authorise trustees to depart from the terms of

their trust. This jurisdiction has chiefly been exercised in chambers; and the comparatively few decisions which, having been delivered in open court, have found their way into the law reports are not easy to reconcile. It has therefore been possible for counsel, assisted perhaps by their personal recollections of what has been done in chambers, to contend that the jurisdiction to sanction a departure advantageous to the beneficiaries is virtually unlimited.

Four reported decisions from the early years of this century are well known. Two of them illustrate the jurisdiction to sanction some unauthorised dealing with the trust property. The other two concern modifications, by way of compromise, of the rights of the beneficiaries *inter se*.

(a) *Dealings with the trust property.* In *Re New* [1901] 2 Ch. 534, the Court of Appeal (reversing three decisions of Cozens-Hardy J. in chambers) held that the inherent jurisdiction enabled the court to authorise trustee-shareholders to concur in a proposal for reconstruction whereby, in lieu of certain shares comprised in their trust, they would obtain shares and debentures in a new company. The judgment of the court, delivered by Fry L.J., proceeded as follows: (i) As a rule, there is no jurisdiction to sanction acts by trustees with reference to the trust property which are not authorised by the terms of the trust. (ii) But if, in the management of the trust property, an *emergency* arises whereby certain acts which they have no power to do become most desirable or even essential "for the benefit of the estate and in the interest of all the *cestuis que trust* . . . and the consent of all the beneficiaries cannot be obtained by reason of some of them not being *sui juris* or in existence," the court can sanction such acts on behalf of all concerned.¹ (iii) This jurisdiction is only part of the general administrative jurisdiction of the court. (iv) It would be wrong (and indeed impossible) to attempt to define all the circumstances in which this jurisdiction is to be exercised; but (in spite of counsel's wider argument) the mere fact that an act desired by the trustees and beneficiaries would benefit the trust estate is not in itself a reason for sanctioning it.

A similar problem arose in *Re Tollemache* [1903] 1 Ch. 457; *ibid.* 955. Here the proposal was that the trustees should sell certain authorised investments yielding 3 per cent. and, with the proceeds of sale thereof, acquire a mortgage (yielding 3½ per cent. and well secured) which the life-tenant had made upon her life interest. This proposal, like that in *Re New*, was in effect a request

¹ See also the passage in *Re Downshire S. E.* [1953] Ch., at pp. 234-5, approved by the House of Lords in *Chapman v. Chapman* [1954] 2 W.L.R., at p. 746.

for permission to invest in an unauthorised investment. It was not, however, a case of *emergency*: permission was therefore refused. In the course of his judgment, moreover, Kekewich J. held that this inherent jurisdiction to authorise *in advance* what would otherwise be a breach of trust had not been enlarged by the new statutory jurisdiction (see now Trustee Act, 1925, s. 61) to relieve from liability trustees who have committed a breach of trust already.

(b) *Modifying the rights of beneficiaries inter se*. It will be noticed that the decisions in *Re New* and *Re Tollemache* dealt only with that part of the inherent jurisdiction which concerns emergencies arising in the management of trust property.¹ They did not involve any question of altering the rights of the beneficiaries *inter se*. Yet the cases show that there is inherent jurisdiction in this direction also.

The common illustration is the sanctioning of payments of income for the maintenance of a beneficiary, in spite of some direction to the contrary (e.g., to accumulate) imposed by the trust.² But there is another important illustration; for the court has power to sanction, on behalf of persons under disability or not yet born or ascertained, a *compromise* between the beneficiaries.³

Two difficult cases on this aspect of the jurisdiction are *Re Trenchard* [1902] 1 Ch. 378, and *Re Wells* [1903] 1 Ch. 848. In the former, Buckley J. sanctioned a proposal that the trustees of a certain settlement should pay an annuity to the life-tenant in return for a release of her determinable life interest. The release being desirable, in order that the trust property might be developed as a building estate, the learned judge sanctioned the proposal and said "this is a fair compromise for all parties."

In *Re Wells*, however, Farwell J. exposed the real problem underlying the compromise jurisdiction: there is no "compromise" in any proper sense of the word if there has been nothing in dispute (see pp. 854-5). The proposal before him was to purchase government annuities for certain annuitants under a will, and so to put an end to the trusts of the will. The proposal was therefore a bargain about known rights, not a compromise of disputed rights. Nevertheless, he sanctioned it, being of opinion that a virtually

² See, e.g., *Re Downshire S. E.* [1953] Ch. 238-9, *per* Evershed M.R.; *Chapman v. Chapman* [1954] 2 W.L.R. 738, *per* Lord Morton of Henryton. According to Kekewich J., in *Re Tollemache* [1903] 1 Ch. 459-60, the "most common" in his time was the sanctioning of advances out of capital for infant beneficiaries. This is not mentioned in *Re Downshire* or in *Chapman v. Chapman*—perhaps in consequence of s. 32 of the Trustee Act, 1925.

³ See the wide dictum of Turner L.J. in *Brooke v. Mostyn* (1864) 2 De G.J. & S. 373, 415, quoted (*inter alia*) in *Re Wells* [1903] 1 Ch. 848, 854, and in *Chapman v. Chapman*, *supra*, at p. 748.

unbroken "chain of authority" (they were in fact chiefly about advantageous bargains for altering the trust *property*) gave him jurisdiction.

The limits of the compromise jurisdiction have now been considered by the House of Lords: *Chapman v. Chapman* [1954] 2 W.L.R. 723. The question here was whether that jurisdiction enabled the court to sanction—on behalf of infants and others—a proposal for altering, with intent to escape a possible liability for estate duty at the settlor's death, certain undisputed beneficial interests. The proposal was simply that certain discretionary trusts for maintenance should be deleted from the settlement. The Court of Appeal (Denning L.J. dissenting),⁴ though of opinion that the compromise jurisdiction in the light of *Re Trenchard* and *Re Wells*, extends to bargains for altering undoubted beneficial interests as well as to compromises of disputed rights, had refused to sanction the proposal. There was here no compromise in any sense whatever; for none of the beneficiaries here was proposing to give up anything (whether known or disputed) by way of compensation to those who were to lose their benefits under the maintenance clauses. The House of Lords affirmed this decision. But, whereas Lord Cohen's reasoning followed substantially that of the Court of Appeal, the majority of their Lordships (Lord Oaksey "with the greatest hesitation") held that the compromise jurisdiction extends only to compromises of uncertain or disputed rights.

Lord Morton of Henryton, whose reasoning and conclusions were in general adopted by all save Lord Cohen, was inclined to regard *Re Trenchard* as no more than the sanctioning of a purchase, by the trustees, of their life-tenant's interest; Lord Simonds L.C. considered it an isolated case where the compromise jurisdiction was unduly extended; and Lord Cohen believed it to be authority that, even when no rights are in dispute, the court has jurisdiction to sanction, where infants are concerned, a rearrangement of rights as between tenant for life and remaindermen. As for *Re Wells*, it seems that the House adopted unanimously the majority decision of the Court of Appeal (see Lord Morton's speech at p. 745) that that case was not really concerned with any proposal to alter or rearrange beneficial interests.

Thus, the majority of their Lordships felt themselves bound to confine within very narrow limits that aspect of the inherent jurisdiction which relates to modifying the rights of beneficiaries *inter se* for their mutual advantage: henceforth, apparently, it is

⁴ *Sub nom. Re Chapman's Settlement Trusts* [1953] Ch. 218.

confined to arrangements for providing maintenance⁵ or for compromising disputed rights.⁶

Their Lordships' opinions in this case, however, raise several interesting problems. There is, of course, the problem whether anything that was said (*e.g.*, the little that was said as to arrangements for maintenance) was *obiter*, and in what way the singular lack of unanimity about *Re Trenchard* has affected the significance of that decision. Moreover, there are interesting excursions, prompted by Denning L.J.'s dissenting judgment in the court below, into more general topics (*e.g.*, pp. 725-6, 747-9, 750). One problem which he raised is of special interest. What is the effect of their Lordships' decision upon trusts which have already been altered, under a supposedly wider jurisdiction, by orders made in chambers (Lord Simonds himself is said to have made such an order—see p. 728), and upon certain recent decisions of that type which have been reported? The latter include *Re Downshire Settled Estates* and *Re Blackwell's Settlement Trusts*, which (with *Re Chapman's Settlement Trusts*—the subject of this appeal) had been considered together by the Court of Appeal.⁷ According to the majority view in the House of Lords, these decisions went too far (pp. 743, 751). Nevertheless, it is at least arguable that the orders made—though *ultra vires*—remain effective. That appears to be Lord Cohen's view (p. 754). "It would take a good deal of argument to satisfy me that [those] orders were a nullity . . . even though your Lordships may, in a later case, have said that the jurisdiction had been wrongly exercised."

(c) *The statutory jurisdiction.* The inherent jurisdiction of the court has been supplemented in recent times by a number of statutory provisions. The appeal in *Chapman v. Chapman* was not concerned with them.⁸ When that case was before the Court of Appeal, however, in company with *Re Downshire S. E.* and *Re Blackwell's S. T.*,⁹ the statutory jurisdictions conferred by section 64 of the Settled Land Act and section 57 of the Trustee Act were considered also.

Section 57 of the Trustee Act, it was held,¹⁰ gives only a

⁵ Including perhaps advancement: see footnote 2, *ante*.

⁶ A recent illustration of the latter is *Re Lord Hylton's Settlement* [1954] 1 W.L.R. 1055, C.A.: there, Harman J. having decided a disputed question on the construction of the settlement, the defendant appealed; and, before the appeal was heard, a compromise was proposed for saving estate duty. The Court of Appeal dismissed the appeal and (on behalf of infants and others) approved the compromise.

⁷ [1953] Ch. 218.

⁸ It has no effect, for instance, upon s. 25 of the Matrimonial Causes Act, 1950: see *Thomson v. Thomson* [1954] 3 W.L.R. 241.

⁹ [1953] Ch. 218.

¹⁰ *Ibid.*, pp. 248 *et seq.*

jurisdiction to confer upon trustees some extra *administrative* power desirable in the interests of the beneficiaries. It is merely an extension of the inherent jurisdiction to authorise dealings with the trust *property* (see (a) above); and its advantage is that it extends the principles of *Re New* to cases in which there is no actual "emergency." That section, accordingly, has no application to proposals for altering beneficial interests.

Section 64 of the Settled Land Act, however, which applies only to settled land, was held (reversing Roxburgh J.) to be more extensive.¹¹ The word "transaction" in that section is defined to include "any compromise or other dealing, or arrangement." It was held accordingly to have here a wider meaning than in section 57 of the Trustee Act—and to extend even to arrangements for altering undisputed beneficial interests.

As indicated above, the majority opinion of the House of Lords in *Chapman v. Chapman* was that the decisions in *Re Downshire* and *Re Blackwell* "went too far." In each of them the Court of Appeal had sanctioned, in order to avoid probable claims for estate duty, a proposal for altering undisputed beneficial interests. So far as these decisions were based upon the inherent jurisdiction, they are clearly inconsistent with *Chapman v. Chapman*. But the decision in *Re Downshire* (which concerned settled land) was based alternatively upon section 64 of the Settled Land Act: to that extent, presumably, it stands.

S. J. BAILEY.

PROFIT À PRENDRE—RABBITING—DISPUTED TITLE

RABBITING rights provided the material for a model problem on the law of *profits à prendre* in *Mason v. Clarke* [1954] 1 Q.B. 460. The case is full of points of interest, particularly since the unsuccessful plaintiff pleaded every possible kind of title: legal, equitable and possessory. The dispute was between a sporting tenant and an agricultural tenant, and of the various matters decided the following are perhaps the most noteworthy:—

(i) A *profit à prendre* cannot, it seems, be granted at law without deed, even for a term of three years or less. The rabbiting rights had been leased orally for one year, and both Denning and Romer L.JJ. stated that no legal rights could thereby arise. No authority was cited, but the decision is in line with opinions expressed over a century ago in *Hewlins v. Shippam* (1826) 5

¹¹ *Ibid.*, pp. 252–60.

B. & C. 221, at p. 229, and in *Wood v. Leadbitter* (1845) 13 M. & W. 838, at p. 843; and if an informal grant of an easement or profit was of no effect at common law, no help could be derived from the Law of Property Act, 1925, s. 54 (2), which provides merely that the statutory rules requiring conveyances to be made by deed shall not "affect" the creation by parol of short leases (the opposite opinion is stated in Gale on *Easements*, 12th ed., p. 44).

(ii) The principal plaintiff also failed in his claim in equity, on the ground that he did not come before the court with clean hands. He had paid £100 for his rabbiting rights, and had been given a receipt saying that this sum was a "contribution towards bailiff's wages." The Court of Appeal declared that the statement was false and that in the absence of evidence they must assume that it was made with a dishonest motive. Therefore the court would not award specific performance and the plaintiff had no right which he could enforce against the agricultural tenant of the land (the plaintiff claimed through the landlord, who had reserved the sporting rights when granting the agricultural lease). The "clean hands" principle is unquestionable, but in this case the court seems to have been very ready to make a presumption of guilt. The plaintiff said that he did not think it his business to ask how the landlord was going to apply the money, and on the reported facts it seems difficult to find fault with him for not doing so. Ought he to have refused the receipt, or investigated the landlord's financial affairs? The learned judge of first instance, who heard the evidence, went so far as to award him punitive damages on the ground that the defendant's allegations of fraud were unjustified. He must have been impressed by the vicissitudes of litigation when on appeal he found himself presumed "in the absence of some alternative explanation" to have acted dishonestly in taking the receipt given to him.

(iii) The question of the title which must be proved in a claim to a *profit à prendre* was touched upon but not elucidated. It is settled that a person who is in effective enjoyment and possession of a right in the nature of a profit need not prove his title if he sues in trespass or nuisance to defend it against someone who shows no title to the property himself: *Fitzgerald v. Firbank* [1897] 2 Ch. 96; *Nicholls v. Ely Beet Sugar Factory* [1931] 2 Ch. 84. In other words, the principle that *jus tertii* cannot be pleaded against a plaintiff in possession by a defendant out of possession applies to profits, though it does not apply to easements: *Paine & Co. v. St. Neots Gas Co.* [1939] 3 All E.R. 812.

But in *Mason v. Clarke* the defendant was in possession as agricultural tenant, and the court rejected the plaintiff's claim (after the failure of his claims at law and in equity) to a possessory title on the ground that he could not disturb the agricultural tenant without proving a title lawfully derived from the landlord. Only Denning L.J. referred to the plea of a possessory title, and he only said: "It was said that Mason had a possessory title, but I do not agree with this." It is submitted that this should not be interpreted as conflicting with the earlier cases, which were cited to the court, but as showing that the boot is on the other leg when the defendant is lawfully in possession of the land over which the profit is claimed. The essence of a possessory title is that it can be defended on the strength of mere possession against a stranger, but that a superior title must be shown as against anyone who can himself make out a lawful right of occupation. But one must resist the temptation to digress further into the interesting subject of possessory titles and *jus tertii*, since the court in fact hardly adverted to it.

(iv) A reservation of an easement or profit in a conveyance, which under section 65 of the Law of Property Act, 1925, now takes effect without the need for a regrant, is (the court held) to be construed nevertheless as if it were a regrant; so that the reservation is construed *in favour* of the person making it, and the doctrine of non-derogation from grant applies against the grantee of the land out of which the reservation is made. This suggestion had already been made by Upjohn J. in *Bulstrode v. Lambert* [1953] 1 W.L.R. 1064. It provides an example of the court's tendency to construe conveyancing legislation in such a way as to minimise its effect on beneficial interests. The result may be thought suitable in cases where it is in fact the purchaser who prepares and tenders the conveyance. Nevertheless it is some departure from a long respected principle. A grant is construed against a grantor because it is his legal act, and he cannot complain if his words are given the fullest meaning which the grantee could reasonably expect—*verba fortius accipiuntur contra preferentem*. In the old days when a regrant was necessary it could reasonably be construed against the person executing it. But now a reservation operates without any regrant, and is the legal act of the grantor alone, to which the grantee need not even be a party (see section 56). It might be suggested with respect that for the purposes of the rules of construction of deeds there has been something more than a change of formalities. A comparison with the rule governing reservations and exceptions at

common law is instructive. A reservation, such as a landlord's reservation of rent or other services, or an exception, such as the exception of woodlands or minerals from a conveyance, was always construed in favour of the grantee under a firm line of authority stretching from the sixteenth century (see Sheppard's *Touchstone*, p. 100) to *Savill Bros., Ltd. v. Bethell* [1902] 2 Ch. 523, at pp. 537-8, C.A. "Every reservation and exception shall be taken *stricté* against the lessor, and beneficially for the lessee because . . . the words of reservation are the words of the lessor, and the reservation is his act": *Lofield's Case* (1612) 10 Co.Rep. at 106b. It was the grantor who made the reservation or exception at common law, and it was right to construe his own act against him. Nowadays it is equally the grantor who makes a statutory reservation, and it seems capricious that his common law reservation or exception should be construed against him if his statutory reservation is to be construed in his favour.

H. W. R. WADE.

LEASE BY ESTOPPEL—WHETHER BINDING ON MORTGAGEE

It seems likely that the House of Lords will shortly be called upon to settle a question which has been much agitated lately and which is of importance to building societies and other mortgagees who join in financing purchases of land; for leave to appeal was given in *Church of England Building Society v. Piskor* [1954] 2 W.L.R. 952, C.A. This is the latest case in a series which shows how awkward it may be for the mortgagee if the purchaser, who is borrowing most of the purchase-money on the security of the property purchased, succeeds in getting into possession of it and letting it to a tenant before the formal completion of the purchase. There then arises a priority problem: does the lease bind the mortgagee, or does the mortgage bind the tenant? If the mortgagee takes subject to the lease, the security may of course be very much impaired, particularly if the tenant is clad in the armour of the Rent Acts.

The doctrine of tenancy by estoppel has a prominent place in the solution of this problem. If A grants a lease to B and puts B into possession of land in which A has no immediate legal estate, B can obtain no legal estate but both A and B are estopped from denying that a legal lease exists; what is more, the estoppels bind their successors in title: see *Mackley v. Nutting* [1949] 2 K.B. 55. If then A or his successor in title obtains a legal estate, this "feeds the estoppel" and B or his successor automatically obtains a legal

lease to the extent of A's intended grant. It is well settled that this doctrine will not operate if at the time of the grant A has any immediate legal estate; but that it operates if A has nothing but an equitable interest, for example if A has mortgaged his land and for the time being can dispose only of the equity of redemption.

The central question is how these rules apply to the common triangular type of purchase, where the vendor conveys to the purchaser, the purchaser at once mortgages to the mortgagee, and the mortgagee (by the purchaser's direction) pays the mortgage money straight to the vendor. As a matter of business this is a single transaction between three parties. But as a matter of law the mortgagee obtains his legal security only as the result of two separate transactions, the vendor's conveyance and the purchaser's mortgage. This point is vital to the case of a tenant by estoppel claiming under the purchaser, since he must show that the legal estate was vested in his landlord before it passed to the mortgagee, so that by the feeding of the estoppel the lease will rank prior to the mortgage. Technically it does not matter whether the estoppel is fed or not, for an unfed estoppel is equally binding on a successor in title. What does matter is that the mortgagee should be shown to claim in succession to the purchaser, and not directly from the vendor. In an abstract legal analysis it is plain that the tenant's case is well founded, since it cannot be denied that the vendor's conveyance vests the whole legal estate in the purchaser, and a slightly smaller estate is then carved out of it by the purchaser in favour of the mortgagee. Yet in *Coventry Permanent Economic Building Society v. Jones* [1951] 1 All E.R. 901 Harman J. held that the purchase and the mortgage were so far one transaction that there was no *scintilla temporis* in which the tenancy by estoppel could become effective and binding upon the mortgagee. This decision was distinguished, but not disapproved, by the Court of Appeal in *Universal Permanent Building Society v. Cooke* [1952] Ch. 95, where the conveyance and the mortgage were dated on successive days, and there was held to be an interval of time in which the tenant's right could assert itself. In the latest case, however, the Court of Appeal have been faced fairly and squarely with a case indistinguishable from the *Coventry* case, and have rejected Harman J.'s doctrine that the conveyance and the mortgage, however close together in time, can be said to be only one transaction. Apart from a case where the tenant loses his priority by being party to a fraudulent misrepresentation to the mortgagee that there is no subsisting lease, the lease by estoppel is held to take effect in priority to the mortgage. It is satisfactory to find that the general principles which govern the priorities of estates have now been

allowed to operate in the most natural way. Building societies and other lenders may have to be more circumspect in their inspections and inquiries in future, but they can hardly claim to be specially favoured against the claims of persons having prior estates in possession, which must be searched for by all purchasers alike.

Variations of this priority problem may arise where the purchaser, instead of purporting to grant a lease, makes a contract to grant a lease; and where the building society attempts to protect itself by requiring the purchaser to enter into a contract for a mortgage before the date when the purchase is to be completed. Any such contracts will be registrable, and the exact sequence of events will be important in applying section 13 (2) of the Land Charges Act, 1925. It is of interest, though as the law stands at the moment no longer relevant, to note that in the *Coventry* case Harman J. held that a purported lease (not a mere contract) by the tenant was registrable as an estate contract, since before the purchaser obtains the legal estate his "lease," apart from its operation by estoppel, can operate only in equity, and (it seems to follow) the relation between landlord and tenant must be one of contract and not one of tenure. This arguable point is for the time being eliminated, since it is held that the tenant can make good his claim to a legal estate by the feeding of the estoppel. But it may arise in other situations, where the ambiguous character of a "tenancy agreement" for a period of three years or less may obscure the question whether the transaction between the parties was a grant or a contract. In the *Universal* case Jenkins L.J. pointed out that (contrary to the opinion given at first instance by Romer J.) there was at least no difference between an oral and a written agreement: if registrable at all, both were registrable equally.

H. W. R. WADE.

AGRICULTURAL HOLDINGS—JOINT TENANTS—NOTICE TO QUIT

PARLIAMENT has rectified with unusual speed the anomaly concerning joint tenants of agricultural holdings which was brought into prominence by *Woodward v. Dudley (Earl of)* [1954] Ch. 283. Of the various grounds on which an agricultural landlord may recover possession of the land under the Agricultural Holdings Act, 1948, almost the only one which is likely to occur in the normal course of events is that "the tenant with whom the contract of tenancy

was made" has died within the previous three months (section 24 (2) (g)). But what if the farm is let to two or more joint tenants, or if the deceased tenant was the survivor among joint tenants? It was held by Danckwerts J. that in such cases all the joint tenants must have died within the three months period for the landlord's notice to be effective, so that only by a rare coincidence of deaths would the landlord have any opportunity to serve notice at all. But within four months of the decision it has been provided by statute that where the contract of tenancy was made with two or more persons jointly, the landlord may serve notice within three months of the death of the last survivor: Agriculture (Miscellaneous Provisions) Act, 1954, s. 7.

One trap for the unwary landlord has therefore been removed. But, now that attention has been focused on the curious words of restriction "with whom the contract of tenancy was made," it may be forecast that they will be the source of other disagreeable surprises. If a farm is let to A, and A assigns the lease (with the landlord's consent if necessary) to B, when, if ever, can the landlord give notice? It cannot be after B's death, for the contract of tenancy was not made with B. On the wording of section 24 it could be argued with some force that notice could be given to B within three months of the death of A, even though A had long ago ceased to have anything to do with the farm. This absurdity could perhaps be avoided by holding that the tenant whose death is relevant must be a present, not a former tenant; but the past tense of subsection (2) (g) does not encourage such a construction. Again, if B succeeds to the lease under the will or intestacy of A, and the landlord takes no action, his right to give notice is lost for ever, since B was not the original tenant. The moral for the landlord is that he should always take steps to recover the land if his tenant dies, or wishes to leave, in order that the next tenant may have to make a fresh contract of tenancy and so be kept within the subsection. On no account, of course, should the landlord allow the tenant to assign his lease to a company, as so many tenants wish to do today.

Another common request by an agricultural tenant is for permission to take his wife or son into the business as joint tenant. Even under the new Act this is disadvantageous to the landlord, who will then have to wait for the death of the survivor. It does not seem likely that the landlord could (even if he wished) give notice after the death of the original tenant (as being the tenant "with whom the contract of tenancy was made") since the effect in law of taking the wife or son into the tenancy is presumably to

bring about a novation, that is to say a fresh tenancy agreement between the landlord and the two tenants jointly. But even this conjecture is subject to the true intent of the Act, which at this point makes exceptional demands on the clairvoyance of its readers.

H. W. R. WADE.

HAROLD COOKE GUTTERIDGE

HAROLD Cooke Gutteridge died in Cambridge on December 30, 1953, at the age of seventy-seven. He had technically retired as long ago as 1941, having then reached the age limit. His death nevertheless is presently a most serious loss both to the Faculty and to Comparative Legal Studies.

His career was a very varied one. Born in Naples in 1876, where he spent the first twelve years of his life, he early acquired the art of languages, a great intellectual sympathy for the foreigner, and a love for the town and district of Naples. But he was himself, as Sir Arnold McNair has said, "the most English of all the men I have known," and, even more particularly, a north-countryman. His ancestors had built ships in Yorkshire and had gone trading in the Mediterranean and especially at Naples, where his family owned the establishment which still bears the name of Gutteridge. He greatly cherished his connection with the sea. He was a passionate and lifelong admirer of Nelson; and his first book published in 1903 concerned Nelson and the Jacobin revolution of 1799 at Naples, in the light of original documents which he had discovered.

Educated at the Leys School and at King's he combined a first in History with a first in Law, and was called to the Bar by the Middle Temple in 1900. He practised law from then until his death, excepting only the period of the 1914-18 War. He entered commercial chambers and established himself in substantial practice. Though entirely averse to displays of emotion, he was profoundly patriotic: he enlisted in the Territorial Force on August 10, 1914, being then aged thirty-eight and married, with three young children. He acted for a period as sergeant-major in the Inns of Court O.T.C. and having been commissioned served with the British Salonika Forces from 1916 to 1919. Demobilised in March of that year, he was offered and accepted the Sir Ernest Cassel Professorship of Industrial and Commercial Law in the University of London, but maintained a consultant practice in the Temple. It is for others to appreciate the extent of the services he rendered to the Faculty of Law in London, of which he became Dean, during the eleven years of his tenure of that chair. It is to the London period that should be attributed both his classical (13th) edition of Smith's *Mercantile Law* and his pioneer work on *Bankers Commercial Credits*, though the books were published in 1931 and 1932.

He returned to Cambridge in 1930, his private means enabling him to accept a Readership in Comparative Law there specially created for him, in lieu of his London professorship. He was elected to a Fellowship at Trinity Hall to his great pleasure and pride. The Readership was in 1934, as a mark of honour, converted into a personal Professorship which lapsed on his retirement. It was re-created in 1944 to be held for a very brief period by Sir Arnold McNair.

Gutteridge had a pre-eminent, and most deserved, international reputation as a comparative lawyer. Yet he was profoundly rooted in the common law of England, and deeply attached to its most characteristic part—the mercantile and especially the maritime law. Indeed he was, and even appeared to be, the very embodiment of that law—as much as Scrutton his one-time master who contemporaneously was presiding in one of the Courts of Appeal. Gutteridge lectured extremely well on common law subjects, especially perhaps on the law of Contract: he had a great zest which he communicated to his audience. He particularly enjoyed recounting the story of a case which had caught his fancy: he almost acted the transaction, which, if sometimes embellished in the telling, never failed to emphasise the critical point in a manner incapable of being forgotten. It was in part because he almost naturally identified himself with the common law—however impatient he might become with some of its unnecessary involutions—that he was so successful as a comparative lawyer. He was truly the apostle of the common law in Europe: his knowledge and appreciation of foreign law enabled him faithfully to interpret it to civilian lawyers; and he himself never lost that sense of the immediate issue which is perhaps the common law's best quality.

His contribution to the advancement, and especially the liberalisation, of legal studies in England is very great. He formed at the Squire Law Library the best collection, at the time of his death, of foreign legal material in this country; and he himself brought to bear on any legal problem a solid, wide and most varied knowledge of foreign law in a way calculated not merely to illuminate that problem but to set it in a new and inspiring context. He established the comparative method in our law schools both in fact at Cambridge and, perhaps even more importantly, as the new way in which generally studies should be undertaken—a new way which more and more is becoming accepted as the normal and even the necessary way. He has done for comparative law what Maitland did for legal history; and the results of his work will be as permanently enriching. It is no prophecy today that comparative law will be the fashion, and scarcely a prophecy that it will widen the horizon of academic

legal studies, and even perhaps of the common law itself, to a degree not imagined before Gutteridge started to teach.

Gutteridge's most enduring literary work is his book entitled *Comparative Law*, first published by the Cambridge Press in 1946 and already translated into French and Spanish. It will long continue to be read. The future reader may even come to wonder how it happened that a declaration as self-evident and obvious as the doctrine of that book ever came to attract attention. But, as Monsieur Ancel has well said, it required all the learning, all the authority and all the experience of Gutteridge himself both to seize upon these essential truths, as matters then stood, and to cause them to be accepted as evident. The controversies at the end of the nineteenth and the beginning of the twentieth centuries had created the grossest confusion. In that jungle of paper and ink Gutteridge found and made a road of such a plain sort that we not only use it as unquestionably a highway but have difficulty in believing that it did not always manifestly appear as such. It is the extent of his success which may deceive posterity as to its quality and merit.

It is much more difficult to speak of Gutteridge's character as a human being. A most admirable memoir has appeared in the *Revue Internationale de Droit Comparé* (1954, p. 77) by Professor René David, one of the first of that group of young men, mostly from abroad, that Gutteridge gathered around himself at Cambridge and the person for whom he had himself a special regard: which, as the reader would see, is reciprocated in a manner which does both men much credit. Gutteridge certainly had the ability to inspire, not only in his pupils, a peculiar respect and admiration and affection. He was so much all of one piece: morally and intellectually honest to a transparent degree, impatient of humbug and nonsense, with a native and most direct courage, at once of robust and plain good sense and of great intellectual ability, most learned and very modest, possessed of a superabundant good humour and an undiminished zest for life, a massive man of the greatest integrity and simplicity and goodness.

In addition to the offices already mentioned, Gutteridge became a K.C. in 1930 and Bencher of the Middle Temple in 1936. He was an LL.D. of London and Cambridge, and received honorary doctorates from Lyons, Grenoble, Paris and Salonika. He was almost permanently the United Kingdom representative at legal conferences abroad such as the Geneva Conference on the Unification of the Law of Bills of Exchange. He was a member of the Royal Commission on the Manufacture of and Traffic in Arms, of the Lord Chancellor's Law Revision Committee, of the Enforcement of

Foreign Judgments Committee, of the Legal Education Committee, of the Shipping Claims Tribunal, and of very many other such bodies. It gave him pleasure towards the end of his life to be elected President of the Society of Comparative Legislation and become the first academic lawyer to hold that office since the inception of the Society in 1896. A bibliography of his publications will be found in the *International and Comparative Law Quarterly* (1954, p. 386), which also contains a memoir by Monsieur Ancel and an appraisal of his writings by Dr. Lipstein.

He died as he had lived : courageously and imperturbably, knowing that he had accomplished his life's work.

C. J. H.

LICENCES, A JONAH'S GOURD *

H. G. HANBURY

Nature of the problem

Until a little while ago the subject of licences was commonly treated, from the standpoint of their revocability by the licensor, as one of the principal illustrations of the relations between equity and law. Denning L.J. has repeatedly *ex cathedra* insisted that fusion has now been effected, not only between the courts wherein the systems of law and equity were administered but between those systems themselves. In this particular subject, while it may be doubtful whether law and equity are fused, there is, unhappily, a certainty that they have been confused.

But it is no longer possible to regard the subject from this single aspect. Currents and cross-currents have disturbed an already unquiet surface.

(a) The inevitable result of the Rent Restriction Acts, which confer an irremovable status on a tenant, has been to render landowners more and more anxious to avoid arrangements whereby that status may be inexorably conferred. Though courts will not deduce an intention to create a lease from a situation in which it is clear that no lease was intended,¹ yet if an agreement presents all the phenomena of a lease it is hard for parties to attach to it any other meaning²; they cannot avoid the implications of a lease merely by calling it a licence. Therefore a landowner who has it in mind to do a kind action to a friend by allowing him, whether for consideration or not, to occupy his house, tends to become more and more astute to use in his agreement words which palpably exclude all imputation of a lease, which would enable the object of his bounty, or his representative, to stand pat on statutory rights.

(b) To the question of the power of the licensor to revoke a licence has now been added that of the power of the licensee to assert its unassailability against a third party, standing, whether by voluntary assignment or otherwise, in the shoes of the assignor. Professor Cheshire has declared that the effect of certain recent

* This article, in an abbreviated form, was delivered as a lecture in the Examination Schools, Oxford, on May 13, 1954.

¹ *Per* Lord Greene in *Booker v. Palmer* [1942] 2 All E.R. 674, 677; *Errington v. Errington* [1952] 1 K.B. 290.

² *Hall v. Seabright* (1609) 2 Keb. 561.

decisions is to create a new equitable interest in land.³ This estimate must be carefully scrutinised.

(c) The subject has been still further complicated by the multiplication of one particular type of case, that of the right of the deserted wife to occupy the matrimonial home. Here, as elsewhere, we must consider her security of tenure, not only as against her husband but also against third parties who can in any way assert a claim to it.

(d) There is a growing realisation that a powerful influence must needs be exerted by the rule that equity will not allow a statute to be a cloak for fraud, and by that operation of the doctrine of equitable estoppel which is conveniently known as the rule in *Ramsden v. Dyson*.⁴ If a stranger builds on land supposing it to be his own, and the true owner, perceiving his mistake, abstains from setting him right, and leaves him to persevere in his error, equity will not afterwards allow the true owner to assert his title to the land. Conversely, it was decided in *Perrott v. Cohen*⁵ that a tenant, who had encroached on a building belonging to his landlord, could not be allowed to avoid paying for repairs to it by alleging that it did not form part of the lease. It is easy to see the bearing that this doctrine must have on cases in which a licensee has expended money in pursuance of a licence which the licensor has given him reason to suppose will not be revoked.⁶

The position at common law

Nowadays the difficulty often is to distinguish a licence from a lease; Professor Glanville Williams has somewhat cynically said that for the purposes of the Limitation Act the courts have tended to "call the occupier a tenant when they want the Act to apply, and a licensee when they do not want it to apply," and that they may apply the same treatment to the Rent Acts.⁷ But the difficulty, until past the middle of the nineteenth century, was to distinguish a licence from an easement. There are fashions in legal history as in other things, and the fashion of that century was to look to Roman law for the origin of every rule in English law. This fashion was harmful in that it led to errors. Thus Spence derived the English use from the Roman *fideicommissum*,⁸ an error which demanded the skill of Ames,⁹ of Holmes,¹⁰ and of Maitland¹¹ to

³ 16 M.L.R. 1.

⁴ (1866) L.R. 1 H.L. 129; Hanbury, *Modern Equity*, 6th ed., 51.

⁵ [1951] 1 K.B. 705; Hanbury, *op. cit.*, 55.

⁶ See *Liggins v. Inge* (1831) 7 Bing. 682.

⁷ (1952) Can.Bar Rev. 1004, 1009.

⁸ *Equitable Jurisdiction*, Vol. I.

⁹ *Lectures on Legal History*, 233.

¹⁰ *Collected Legal Papers*, 1.

¹¹ *Collected Papers*, 403.

put right. Stephen began his masterly three-volume *History of Criminal Law* with an exhaustive account of Roman criminal law, whereas modern research has shown that the two have little in common.¹² But in the law of easements the effect of the fashion was permanent. No part of the law of real property was more obscure until Gale published his great textbook in 1845.¹³ The law is largely textbook law, and that law is founded, line upon line, precept upon precept, on the Roman Law of praedial servitudes. It was in 1868, in *Rangeley v. Midland Ry.*¹⁴ that it was definitely established that there cannot be an easement in gross. If there is not a dominant and a servient tenement, a right will sink to the level of a licence, revocable normally at the will of the licensor. In passing, it should be noted that the emphasis laid on the necessity for the persistence of dominant and servient tenements has been applied by equity to restrictive covenants,¹⁵ and so, if we are to identify the licence, grown to its present stature, with one of the existing equitable interests affecting land, it must be elsewhere than to the restrictive covenant that we must look. But a licence must also be distinguished from a grant, though the words have sometimes been interchangeably used. The *locus classicus* of the distinction is to be found in the judgment of Vaughan C.J. in *Thomas v. Sorrell*.¹⁶ Leave to hunt in a man's park is a licence, but leave to take away the game killed is a grant. The distinction is not very clear cut, but it has never been improved upon, and we must make do with it. Its significance is that while a licence may be by parol, a grant must be under seal. But a grantee, no less than a licensee, might at common law be left defenceless against a third party. Thus in *Hill v. Tupper*¹⁷ it was held that X, who had acquired by a grant under seal from a canal company an exclusive right to hire out pleasure boats on it, had no right of action for damages against a stranger who competed with him in this activity. It is arguable that he might now obtain an injunction, together with incidental damages, under the combined effect of Lord Cairns' Act and the Judicature Act.¹⁸ The way to the correction of the injustice of *Hill v. Tupper*¹⁹ may be found to lie through *Jones v. Earl of Tankerville*,²⁰ and the modern cases on third parties.

¹² See, e.g., Strachan-Davidson, *Problems of the Roman Criminal Law*.

¹³ See Holdsworth, 7 H.E.L. 323.

¹⁴ (1868) L.R. 3 Ch. 306.

¹⁵ *L. C. C. v. Allen* [1914] 3 K.B. 642; *Formby v. Barker* [1903] 2 Ch. 539; *Millbourn v. Lyons* [1914] 2 Ch. 231.

¹⁶ (1672) Vaughan 330, 351; see also *L. C. C. v. Warr* [1904] 1 K.B. 713, 721; *Clore v. Theatrical Properties* [1936] 3 All E.R. 483.

¹⁷ (1863) 2 H. and C. 121. See Salmond on *Torts*, 11th ed., 282.

¹⁸ Hanbury, *op. cit.*, 76, 610; Salmond, *op. cit.*, 282, note (r).

¹⁹ (1863) 2 H. and C. 121. See Salmond on *Torts*, 11th ed., 282.

²⁰ [1909] 2 Ch. 440; *post*.

We must now trace historically, through the cases, the common law as to licences.²¹ The familiar starting-point is *Webb v. Paternoster*.²² X gave Y a licence to lay a stack of hay on his land for a reasonable time. Then X leased the land to Z, who turned in his cattle, who ate the hay. Whether Y's right were a licence or a grant, he could not at that time have sued Z, but could he sue X? That should depend on the nature of his right, whether licence or grant. Dodderidge classified such permissions—to use a neutral word—into (a) those for mere pleasure, (b) those for an uncertain profit, (c) those for a certain profit, and laid down that (a) and (b) were, while (c) were not, countermandable at pleasure. Haughton distinguished between those which are executory and countermandable,²³ and those which are executed and not countermandable. The permission in this case was, in his view, executed, and so Y could have sued X had not a reasonable time, half a year, elapsed. In *Wood v. Lake*²⁴ X, by parol agreement, gave Y permission to stack coals for seven years on his land. After three years X locked up the gate, so denying to Y the further exercise of the permission. The licence can never have been regarded by either party but as falling within Dodderidge's Class (c), for X made no attempt to assert that it was countermandable at will; his defence simply was that it was the product of a contract falling within the danger of the Statute of Frauds. But the court, ignoring its contractual aspect, and so placing over one eye a patch which, though sometimes lifted, was not to be finally removed for nearly 200 years, in *Winter Garden Theatre v. Millennium Productions*,²⁵ laid down that the Statute could not touch such a licence, which was valid for seven years.

Haughton's distinction of licences into executed and executory was taken in *Winter v. Brockwell*.²⁶ X gave Y a parol licence to put a skylight over his area, of which Y availed himself at some expense. Finding that the result of Y's action was to stop light and air from coming to his own window, X sued Y for nuisance, but it was held that he could not succeed, at least without tendering to Y the amount of his expenditure.

These cases might be claimed as powerful authorities in favour of the irrevocability of licences, but we now come to two which seem to place licensees in an even more favourable position, one because of the nature of the acts contemplated by the licence, the other

²¹ See Gale on *Easements*, 12th ed., 43–70.

²² (1620) Palmer 71.

²³ *Wallis v. Harrison* (1888) 4 M. and W. 538.

²⁴ (1751) Sayer 3.

²⁵ [1946] 1 All E.R. 678; [1948] A.C. 173.

²⁶ (1807) 8 East 308.

because (a) it does take notice of the contractual aspect of the licence, (b) the licence, when executed, is made to bind third parties. In *Tayler v. Waters*²⁷ X, the manager of an opera-house, gave, for valuable consideration, tickets of admission to Y for twenty-one years. One of these was bought from Y by Z, whose right of entry remained unchallenged for fifteen years. He was held entitled to recover damages from X, who denied him entry at the end of this period. In *Crosby v. Wadsworth*²⁸ it was laid down that if X, under a contract, sells to Y a growing crop of grass in his close, to mow into hay, he can bring trespass against anyone entering the close and taking the grass, though with the assent of X; but the contract is "voidable" if not according to the Statute of Frauds, and may be discharged by parol notice from X, before any part of it has been executed. This case is interesting for two reasons:—

(a) By "voidable" is meant, of course, "unenforceable." The statement that the contract ceases to be unenforceable as soon as it has been in part executed reveals a replica at common law of the equitable doctrine of part performance.²⁹

(b) The court appears to have been in a dilemma as to property and contract, the two distinct lines of approach which, as Mr. Wade showed in the former of his two illuminating articles, manifested themselves at a later period.³⁰ If the licence confers a right of property, it is of course valid against third parties, whether they have notice of it or not, but if it confers a merely contractual right, the view expressed constitutes a departure from the principle that common law will give no help to the third-party beneficiary of a contractual right; indeed, common law would here be more equitable than equity, for no reservation is made in favour of a bona fide purchaser.

The subject-matter of the licence in *Tayler v. Waters*³¹ differs from that given in the other cases, in that it is of an altogether more intangible and evanescent nature, for a seat in an opera-house, even for the season, obviously lacks the element of durability which belongs to the provision of a receptacle for coals, or grass to be mown into hay. To this difference we must return, for on it Alderson B. laid much stress in *Wood v. Leadbitter*,³² the famous case

²⁷ (1817) 7 Taunt. 374. At p. 384 Gibbs C.J. said: "a beneficial privilege in land may be granted without deed, and, notwithstanding the Statute of Frauds, without writing . . . and cannot be countermanded, at least after it has been acted upon."

²⁸ (1805) 6 East 602.

²⁹ See *per* Denning L.J. in *Bendall v. McWhirter* [1952] 2 Q.B. 466, 480.

³⁰ 64 L.Q.R. 57.

³¹ (1817) 7 Taunt. 374.

³² (1945) 13 M. and W. 838.

which constituted a turning point towards a more precarious status for the licensee.

The principle of the irrevocability of an executed licence, emphasised in *Winter v. Brockwell*,³³ was further strengthened by the great authority of Tindal C.J. in *Liggins v. Inge*.³⁴ The predecessor of X, who was entitled to the flow of water to his mill over Y's land, by parol licence authorised Y to cut down and lower a bank, and erect a weir on his own land, the effect of which was to divert into another channel the water required for working X's mill. Subsequently X complained to Y of the injurious effects of the weir, and called upon him to remove it and restore the bank to its former height. Y was held justified in refusing to comply, for the licence, once executed, was not countermandable. Here common law anticipated the result reached by equity in *Ramsden v. Dyson*,³⁵ and Tindal C.J.'s judgment was expressly approved by the Judicial Committee in *Plimmer v. Mayor of Wellington*.³⁶

We must now look at some cases falling on the other side of the line, on which Alderson B. was greatly to rely in *Wood v. Lead-bitter*.³⁷ In *Hewlins v. Shippam*³⁸ X gave Y, for valuable consideration, a licence to make a drain at Y's expense on X's land. Y made it at great expense to himself, only to have it stopped up by X. In his action against X he was non-suited, on the ground that the right claimed was a freehold right, and should have been created by deed. *Winter v. Brockwell*³⁹ was distinguished on the ground that there the acts of the licensee were performed on his own land, here on the land of the licensor. This decision may be satisfactory from a technical, though hardly from an ethical, standpoint, but the case could not be brought within the principle of *Ramsden v. Dyson*⁴⁰ in that no illusion had been induced as to

³³ (1807) 8 East 308.

³⁴ (1831) 7 Bing. 682.

³⁵ (1866) L.R. 1 H.L. 129.

³⁶ (1884) 9 App.Cas. 699, 714; the facts are given by Cheshire in 16 M.L.R. 1-6. In *C. P. R. v. R.* [1931] A.C. 414, however, the Crown was held entitled to revoke a licence given to the appellants with no intimation of permanence.

³⁷ (1845) 13 M. and W. 838.

³⁸ (1826) 5 B. and C. 221. Bayley J. cited Lord Ellenborough in *Fentiman v. Smith* (1803) 4 East 107, 109, "The title to have the water flowing in the tunnel over the defendant's land could not pass by parol licence without deed." *Webb v. Paternoster* (1620) Palmer 71; *Wood v. Lake* (1751) Sayer 3; *Taylor v. Waters* (1817) 7 Taunt. 374, were not cases of freehold, "and in none of them was the objection taken that the right lay in grant, and must be by deed." But in *Wallis v. Harrison* (1838) 4 M. and W. 538, 543, Lord Abinger explained *Webb v. Paternoster* as "a grant of the occupation by the haystack—and the party might be considered in possession of that part of the land which the haystack occupied, and that might be granted by parol."

³⁹ (1807) 8 East 308.

⁴⁰ (1866) L.R. 1 H.L. 129.

the actual title to the land. But an even harder case was *Bryan v. Whistler*,⁴¹ unless it can be supposed to turn on the lack of authority on the part of the rector of a parish. The rector had purported to give a parol licence to X to make a vault in the church for the burial of Y, and had taken it on himself to promise him the exclusive use of it. But X's labour and expense were thrown away, for it was held that the rector was free to bury other persons in the vault. Decidedly a case of *sic vos non vobis*! *Wallis v. Harrison*⁴² turned on the point that the licence, when revoked, was still executory, and Lord Abinger, foreshadowing modern problems, expressed the view that a licence, while executory, could always be disregarded by a purchaser from the licensor, with or without notice.

We now come to *Wood v. Leadbitter*.⁴³ The plaintiff bought a ticket entitling him to a place in the grandstand for the four days of Doncaster Races. On one of those days he was requested by the defendant, acting under the orders of Lord Eglinton, the steward of the races, to depart. He refused to do so, and was then ejected by the defendant, who used no unnecessary violence. He sued for damages for assault, and his action raised the question of the nature of his right. Could it be said that he had any right which the defendant, acting as the servant of the owner of the land, had violated? Alderson B. ruled that he had no such right, Lord Eglinton being entitled at any time to revoke his permission. The plaintiff having rested his entire case on the licence, the question of any right to recover damages for breach of contract did not arise, even to the extent of the return of the price of his ticket. Denning L.J. in *Bendall v. McWhirter*,⁴⁴ it is respectfully submitted, misunderstands the rationale of Alderson B.'s judgment in his statement that the licence would have been irrevocable for the entire period of four days if it had been under seal. It is true that Alderson B. does distinguish *Webb v. Paternoster*⁴⁵ on the ground that the licence there was probably under seal, but this is hardly consistent with his remark, two pages later in the report, that "a licence under seal (provided it be a mere licence), is as revocable as a licence by parol."⁴⁶ *Dormitat Homerus*; what he must have

⁴¹ (1828) 8 B. and C. 288. It is submitted that *Cocker v. Cowper* (1834) 1 C.M. and R. 418, is not a case on a licence at all, but on an unsuccessful attempt to claim an easement. In 1815, X cut a drain in the land of Y, the water from which he appropriated as it ran through his own land. In 1833 Y stopped the drain. It was held that he was entitled to do so.

⁴² (1838) 4 M. and W. 538.

⁴³ (1845) 13 M. and W. 838.

⁴⁴ [1952] 2 Q.B. 466, 479.

⁴⁵ (1670) Palmer 71; see (1845) 13 M. and W. 838, 845.

⁴⁶ (1845) 13 M. and W. 838, 847.

meant to say was that the interest in that old case was a grant, and not a mere licence at all. *Wood v. Lake*⁴⁷ he regarded as supportable on the ground of contract, though he found it difficult to see how it could be regarded as outside the Statute of Frauds. *Winter v. Brockwell*⁴⁸ he regarded as distinguished by the words of Lord Ellenborough himself, who emphasised that the licence there had been executed, and in its execution the licensee had incurred expense. *Taylor v. Waters*⁴⁹ he, in common with Bayley J. in *Hewlins v. Shippam*,⁵⁰ regarded as wrongly decided. This case is a landmark, for it sharply marks off licences from easements and from grants. The absence of a seal will depose a permission from the two higher categories, but its presence will not elevate a permission into them, unless it possesses the other characteristics necessary for inclusion. A mere licence, whether under seal or not, can be terminated at will by the licensor, and *a fortiori* by a purchaser from him.

The position in equity

We must reflect firstly that common law judges had always before them the knowledge that Chancery might nullify a judgment by forbidding a successful plaintiff to execute it⁵¹; secondly, that equity will not allow a statute to be made a cloak for fraud, and so will not allow a party to invoke the absence of a necessary seal or writing in order to evade a clear moral obligation; thirdly, that an overriding influence was exercised by equitable estoppel, which will prevent one man from leading another into a fool's paradise by standing by and allowing him to incur expense in the execution of a project, and then seeking to rely on legal title in order to prevent his further enjoyment of the fruits of his toil. We have seen that this application of equitable estoppel converges towards the same

⁴⁷ (1751) Sayer 3.

⁴⁸ (1807) 8 East 308.

⁴⁹ (1817) 7 Taunt. 374. But Patteson J. professed to follow it in *Wood v. Manley* (1839) 11 A. and E. 34. X sold goods on his land to Y; the contract of sale contained a permission to Y to enter and take them. Alderson B. pointed out in *Wood v. Leadbitter* (1845) 13 M. and W. 838, that it was unnecessary to rest the case on the validity of the licence; even without such a licence Y could enter, being entitled to exercise recaption just as if the goods had been placed there by the wrongful act of X; see Salmond on *Torts*, 11th ed., 217.

⁵⁰ (1826) 5 B. and C. 221.

⁵¹ See *R. v. Horndon-on-the-Hill (Inhabitants)* (1816) 4 M. and S. 562, 565. The awareness of common law judges as to the possibility of interference is well illustrated by the remarks of Lord Abinger in *Doe d. Tomes v. Chamberlaine* (1839) 5 M. and W. 14, 15: "If this were a court of equity, it is clear the court would not allow the vendor to take back the estate, unless he were in a condition to fulfil the contract on his part. But in a court of law, we can only look at the legal title."

goal as the protection at common law of executed licences.⁵² We must keep these three principles constantly before us in attempting to summarise the attitude of equity towards licences and their revocation. Their working may be illustrated by many cases. *Rochdale Canal Co. v. R.*⁵³ arose out of a Canal Act, empowering millowners to use the canal water merely for "condensing" steam. In 1829, X, being about to erect a mill, applied to the company for leave to take water for "generating" as well as "condensing." The company did not, apparently, refuse, and pipes were laid down in the presence of their engineers. As the mill had been built on the understanding that the canal waters would be used for both purposes, and as they had been thus used, the company was held disentitled to stand pat on the strict letter of the statute. They were bound by their acquiescence, and so could not have an injunction to restrain X from taking the water for generating steam. At first sight the decision appears very strong indeed, as asserting a claim by equity to override a statute, but the relevant section merely set out the rights of millowners and did not circumscribe the authority of the company to grant others.⁵⁴

*Beaufort v. Patrick*⁵⁵ is especially interesting in that it involved a third party. In 1794 an Act authorised the construction by a company of a public canal, through land of which X was owner and Y his lessee. Upon payment of the compensation, the land was to vest in the company. Arrangements for compensation were made with Y, but not X. But the canal was made "with the full approbation" of X, whose name was mentioned in the Act. In 1844 Y's lease came to an end, and X's representatives *recovered the land in an action at law*. But Romilly M.R. refused to allow Z, a purchaser from X with notice that X had sanctioned the construction of the canal, to take possession on the strength of the absence of any arrangement for compensation with X; Z was entitled merely to a fair compensation, which the court might then and there determine, based on the agricultural value of the land as calculated in 1844.

Equity may interfere so as to compel the completion of a conveyance, or to qualify an ostensibly completed conveyance by compelling the alienee to respect an informal undertaking by him in

⁵² The most famous statements of this aspect of equitable estoppel are those of Lord Eldon in *Dann v. Spurrier* (1802) 7 Ves. 230, 235; and Romilly M.R. in *Rochdale Canal Co. v. R.* (1853) 16 Beav. 630, 633. See also *Cheshire* in 16 M.L.R. 1, 5.

⁵³ (1853) 16 Beav. 630.

⁵⁴ Romilly M.R. does, however, more than once talk of the use of the water for "unauthorised purposes."

⁵⁵ (1853) 17 Beav. 60.

favour of the alienor, or a third party. In *Dillwyn v. Llewellyn*⁵⁶ X placed his son Y in possession of land, signing a memorandum that he had given the land to him so as to furnish him with a house. Y built a house on it at his own expense. X died, and was found to have made a will which gave Y but a life estate in the land, with remainder to Y's son, Z, who was an infant. The trustees of X's will were thus bound to try the question out, and it was held that they must convey the fee simple to Y. Conversely, in *Bannister v. Bannister*,⁵⁷ X conveyed a cottage to Y, Y orally agreeing to allow X to inhabit it rent free for as long as she wished. It was held that this agreement must be enforced, for it would be a fraud on the part of Y to eject X on the strength of the absence of writing.

In *Jones v. Earl of Tankerville*⁵⁸ equity protected the plaintiff in the enjoyment of a *profit à prendre* which was void at law for lack of a seal. X had sold to Y certain timber growing on his property; Y was to have access to the land for the purpose of cutting, sawing and removing it. X repudiated the contract and forcibly ousted Y's workmen. Y was held entitled to an injunction to restrain X from preventing the due execution of the contract.

These three principles are true guiding lights. But a fourth principle has been suggested, which is an *ignis fatuus*. This is the supposed principle on which *Hurst v. Picture Theatres*⁵⁹ was based, and is, it is submitted, nothing but an unjustifiable extension of the second principle. There it was decided by a majority of the Court of Appeal that if X pays for a seat in a theatre, and is ejected though he has been guilty of no misconduct, he can recover substantial damages from the management for assault. Buckley and Kennedy L.JJ. rested their opinion on the power of equity to protect an interest despite the absence of a seal.⁶⁰ It has been remarked that some parts of the judgment of Alderson B. in *Wood v. Lead-bitter*⁶¹ are inconsistent with certain other parts, but they did entirely overlook his clear statement, that a mere licence is as revocable, though conferred under seal, as if it were created by parol. It differs essentially from a conveyance, an easement, a profit, or a grant. The decision was rejected by the High Court of Australia in *Cowell v. Rosehill Racecourse Co.*⁶²

⁵⁶ (1862) 4 de G.F. and J. 517.

⁵⁷ [1948] 2 All E.R. 133; cf. *per* Lindley L.J. in *Rochefoucauld v. Boustead* [1897] 1 Ch. 196, 206.

⁵⁸ [1909] 2 Ch. 440. For other points in the case, see Hanbury, *op. cit.* 614-6.

⁵⁹ [1915] 1 K.B. 1.

⁶⁰ See *Duke of Devonshire v. Eglin* (1851) 14 Beav. 530; *Frogley v. Earl of Lovelace* (1859) Johns. 333.

⁶¹ (1845) 13 M. and W. 838.

⁶² (1937) 56 C.L.R. 605; see Hanbury, *op. cit.*, 104.

The contractual aspect of licences

In *Wood v. Leadbitter*⁶³ Alderson B. dealt with the matter exclusively from the standpoint of property. The point was never raised before him, that there was a contract, implicit in the licence, for the breach of which the licensee could claim damages.⁶⁴ It was inevitable that the licence in *Thompson v. Park*⁶⁵ should have been treated in the same way, owing to the absence of a seal or, apparently, consideration. X and Y were both headmasters of schools. They had a "gentlemen's agreement" that their schools should be amalgamated in X's buildings for the period of the war. But X proved to be the only gentleman; Y's behaviour was such that X eventually told him to take his boys away at the end of one further term. Y having taken no steps to find other premises, X, at the expiration of the notice, removed Y's effects from the house and stored them in an outbuilding. Y having made a forcible re-entry, X was held entitled to an injunction to restrain his trespass.

But the contractual aspect has been by no means ignored. A formidable number of cases have established the principle that it is implicit in the creation of a licence that it shall not be revoked without reasonable notice.⁶⁶ In *Cornish v. Stubbs*⁶⁷ X let his house to Y, as weekly tenant; the agreement provided that Y be allowed a reasonable time to remove his goods after the expiration of a notice to quit. X died, and was succeeded by his son Z, who for a time received rent from Y, but eventually gave him a week's notice to quit, and, at the end of the week, took possession of the premises, refusing to allow Y a reasonable time for removal. It was held that Z stood in no different position from X, not because he was a volunteer,⁶⁸ but because he had agreed, expressly or impliedly, that Y should hold of him on the same terms as those on which he had held of X. It was held that Y's tenancy must be taken to continue, presumably in the form of an implied licence,⁶⁹ for a time reasonably sufficient for removal. The same solution was applied to a permission to stack timber on adjoining land of X, in respect of which the rent was partly paid.⁷⁰ Bovill C.J. cited Coke upon Littleton,⁷¹ to the effect that the law will sometimes

⁶³ (1845) 13 M. and W. 838.

⁶⁴ See *Kerrison v. Smith* [1897] 2 Q.B. 445.

⁶⁵ [1944] K.B. 408.

⁶⁶ See H. W. R. Wade in 64 L.Q.R. 57.

⁶⁷ (1870) L.R. 5 C.P. 334; followed in *Mellor v. Watkins* (1874) L.R. 9 Q.B. 400.

⁶⁸ Cf. *Errington v. Errington* [1952] 1 K.B. 290.

⁶⁹ Willes J. called it an enlargement of the term.

⁷⁰ The evidence showed that the stacking licence had been renewed by Z after X's death.

⁷¹ s. 69; (1870) L.R. 5 C.P. 334, 337. The assignees of a tenant can remove his goods, including removable fixtures, within a reasonable time after the termination of a tenancy by forfeiture: *Stansfield v. Mayor of Portsmouth* (1858) 4 C.B.(n.s.) 120, 133, 135.

annex a right of continued occupation to a tenancy at its termination, for purposes of convenient removal, and if this can be done by operation of law, *a fortiori* it can be done by act of the parties.

In *Butler v. Manchester, Sheffield and Lincolnshire Ry.*⁷² no question of reasonable notice arose. A traveller had lost his ticket; an inspector demanded that he pay his fare over again, and, on his refusal to do so, ejected him; it was held that he could recover damages for assault, on the ground that it was no part of the contract between him and the company that they should be entitled forcibly to remove him for any such reason.

The next three cases concern the hire of space for advertising. In *Kerrison v. Smith*⁷³ there was an oral agreement by X to let a wall to Y for billposting, for £2 10s. 0d. a year, Y to erect a hoarding on the wall on which bills were to be posted; Y duly erected the hoarding, and made several payments. X gave Y notice to remove the hoarding, and a month later removed it himself; it was held that Y could sue for breach of contract, though the agreement constituted merely a revocable licence. The question of reasonable notice did not arise here, but it arose in *Wilson v. Tavener*.⁷⁴ The agreement in that case was written. X agreed to let Y erect a hoarding upon the forecourt of a cottage and to allow him the use of a gable end for a billposting station at a yearly rent payable quarterly. It was held that this was not a tenancy from year to year—it is difficult to see how it could have been so interpreted—but a licence revocable at will on reasonable notice, and a quarter's notice terminating at the end of the year of currency of the agreement was within this definition. The licensor would here, indeed, appear to have erred on the side of generosity to the licensee. The third case, *Chapman v. Edwards*,⁷⁵ though Bennett J. was somewhat loose in his nomenclature, is interesting for two reasons: (a) He applied to a licence the rule governing easements, that a grantor must not derogate from his grant⁷⁶; (b) the licence was, in the event, more beneficial than an easement. X was the underlessee of premises used as a petrol station; included in the parcels of the lease was the right to use the flank walls of the adjoining premises for advertising purposes. X granted to Y (Odhams Press), the right to advertise on the flank walls. Z, the successor in title of W, the underlessor, sought an injunction to restrain X from permitting anyone else to use the flank walls for

⁷² (1888) 21 Q.B.D. 207; Wade in 64 L.Q.R. 57, 65.

⁷³ [1897] 2 Q.B. 445.

⁷⁴ [1901] 1 Ch. 578.

⁷⁵ [1938] 2 All E.R. 507.

⁷⁶ Gale on *Easements*, 12th ed., 103; Cheshire, *Modern Real Property*, 7th ed., 473.

advertising, on the ground that the right to advertise was not assignable at all, or, alternatively, not assignable apart from the land on which the petrol station was situated. He urged, moreover, that a term must be read into his agreement with X, that the only advertisements shown on the walls should be those connected with the business of the petrol station. It was held that the advertising right was not an easement, but a licence, which X could assign apart from the land.⁷⁷ It must be construed strictly against W. and so X could deal freely with its subject-matter, unless restrained by express words in the agreement. *Minister of Health v. Bellotti*⁷⁸ turns entirely on the estimation of a reasonable period for revocation. The licensor was here as tyrannous as the licensor in *Wilson v. Taverner*⁷⁹ was indulgent. The Government compulsorily evacuated the civilian inhabitants of Gibraltar during the war, and the Ministry of Health found them accommodation. No formal lease of the premises was drawn up, and they were clearly in the position of licensees. The Ministry, apparently yielding to the spiteful complaints of xenophobic neighbours, revoked the licence, and, with a lack of human feeling on which the members of the Court of Appeal did not hesitate to animadvert, limited the period of notice to a week. The court held that this period was far too short, though, in the result, the period which would have been reasonable had been exceeded by the time when the action was brought. Lord Greene pointed out the circumstances which rendered the action of the Ministry particularly objectionable. The licence was not gratuitous; and the licensees had been uprooted by the Government itself from their homes, and were strangers in a strange land.

The ground is now prepared for *Winter Garden Theatre v. Millennium Productions*.⁸⁰ The subject-matter of the licence was the theatre itself. Its terms were set out in two letters of 1942. The rental was fixed at £300 a week, and the licensees were to give the licensors one month's notice of their intention to terminate the licence. In the event, however, it was the licensors who, in 1945, gave the licensees notice to vacate. The licensees sued for a declaration that the notice was ineffective, as the licence gave the licensors no power to revoke; alternatively, that they had not received reasonable notice. The licensors counterclaimed for an injunction restraining the licensees from continuing to use the

⁷⁷ This is contrary to the opinion of Pollock C.B. in *Coleman v. Foster* (1856) 1 H. and N. 37, 40—"a licence is a thing so evanescent that it cannot be transferred."

⁷⁸ [1944] K.B. 298. Cf. *C. P. R. v. R.* [1931] A.C. 414, 432.

⁷⁹ [1901] 1 Ch. 578.

⁸⁰ [1948] A.C. 173.

theatre, and damages for trespass. The Court of Appeal, having held the licence irrevocable, were reversed by the House of Lords, who took, however, a different view from that originally taken by Roxburgh J. as to the reasonableness of the period of notice. Assisted by the reflections of the Court of Appeal in *Minister of Health v. Bellotti*,⁸¹ the House came to the conclusion that the licensees were entitled to a longer time than would be sufficient for them merely to vacate the theatre; regard must also be had to the licensees' future commitments. Lord Greene in the Court of Appeal, and Viscount Simon in the House of Lords, though differing as to the construction of the licence, took the same view as to its relation to the contract which created it. A term must always be implied that the licence, if revocable, will not be revoked without reasonable notice, which must be commensurate with the exigencies of the particular case. Viscount Simon expressly approved *Hurst v. Picture Theatres*,⁸² which, in common with many other cases, may be said to rest on a firmer base than that on which it was placed by the majority of the judges who decided it.

(To be concluded)

⁸¹ [1944] K.B. 298.

⁸² [1915] 1 K.B. 1.

MECHANISM OF DEFINITION AS APPLIED TO INTERNATIONAL LAW

R. W. M. DIAS

I

ONE danger that arises from the attention recently devoted to definition in jurisprudential writings is that too much importance may be attached to mere definition as such. Students especially tend to overlook the point that definitions possess no magic or finality, except when they happen to be prescribed authoritatively, for example by statute. What is important is not the definitions, but the analysis on which they are based. In order to appreciate this it is necessary to consider their function and structure, and that is the reason for linking together in the present article two topics, which could otherwise be dealt with separately.

Words, as used by any given person, stand for the mental impressions in his mind of what may compendiously be called "things."¹ Definition of a word is the explanation of it in other terms so as to evoke in the mind of the definee an impression similar to that in the mind of the definor. The definor's impression depends on the subject-matter and his view of it. The word "Law," for instance, has many applications. Broadly speaking, it covers what may be called "scientific" and "man-made" law; but (even excluding the first category), "man-made" law can be divided and subdivided into various branches, such as municipal, customary, international and so forth; or the subject-matter may be the characteristics of Law or Law in operation. Then again, the point of view of a lawyer will not resemble that of a layman, that of a legislator will not coincide with that of the courts. In every case, then, what the definor expresses is his mental impression of the thing. Any method of definition is appropriate which does this adequately.

Among the considerations that determine adequacy there stands foremost the question for whom the definition is designed. It is obvious that the definition must be graded to suit the particular definee. Definitions of Law for a lawyer and a layman will be

¹ Ogden and Richards, *The Meaning of Meaning*, 10th ed. (1949), Chap. VI, especially pp. 110, 113.

dissimilar in many respects.² The second and more important question is how this should be done. One method of defining a word is to point to the object for which it stands, provided of course the object is available. Otherwise the definition may substitute other words, symbolising the same thing, in place of the word to be defined. This is possible only when the thing is already known to the definee in terms of the substituted terms. Where, however, the thing is not known to the definee, a definition of its symbol needs to identify the thing. This may be accomplished by demonstrating the relation between the thing and other known things in space, time, or causation; or, if the thing belongs to a known class, the definition can point to the class and indicate the difference between the thing and other things in the same class. The latter is the time-honoured technique *per genus et differentiam*. It is unobjectionable as long as the resulting definition is not invested with sanctity, since classification into species is arbitrary and the selection of *differentiae* a matter of choice.

Where the thing behind the definiendum can be identified with reference to other things that are known to the definee, definition usually assumes the form, "X is . . ." Where it cannot be so identified, this form is inappropriate. Definition may then consist of an enumeration of its characteristics and is equivalent to description. Professor Hart has suggested a different technique. He says that the definiendum should not be taken in isolation, but in the context of a characteristic statement and that the definition should embody the conditions under which such statement is true.³ There will, no doubt, be instances when this method of approach will be overwhelmingly helpful, but it should not be regarded as the only proper method, or even as appropriate to a particular type of case.⁴

Whatever the method adopted, the next question concerns the degree of completeness to be attained, in short, should a definition aim at being comprehensive? At the outset it is pertinent to ask

² An example of a definition not suited to the definee: a zoologist once defined "horse" for a lawyer as referring to "a warm-blooded, hairy, ungulate perisso-dactyle, vertebrate mammal," on which the latter commented that it did not give him "a vivid picture of the animal": Buckland, *A Manual of Roman Private Law*, 2nd ed. (1939), p. xii.

³ "Definition and Theory in Jurisprudence" (1954) L.Q.R. pp. 37, especially 41, 47. Thus, a definition should not be of the word "right," but of a statement such as "X has a right that Y pays him £10."

⁴ Hart advocates his technique for the definition of "duty" as well. Perhaps he would not deny that the "X is . . ." method is also possible. "Duty" is an abstraction, and abstractions are formed by a selection of the elements common to a number of factual instances: Ogden & Richards, *op. cit.*, pp. 113-4, 212-3. The "is" could be used to point to such common element thus: "duty is a pattern of conduct." Hart may regard such a definition, even with additions, as falling into one of his "disquieting triad" of theory forms. The crucial question is whether such a definition of duty is adequate. That is the crux of this article.

whether comprehensive definition is possible.⁵ Now, a definition does not state the details of the thing, but its abstracted characteristics. Abstraction involves selection: hence, even if one include all the abstracted characteristics, there will still be this element of selection. It is seldom, however, that one can include all the abstracted characteristics; and many a definition, which looks exhaustive, only includes a large number of characteristics. More usually, definors discriminate still further by including only those features which they regard as significant.⁶

Of what value, then, is a comprehensive (assuming such to be possible) or near-comprehensive definition? The answer that it satisfies an aspiration towards completeness need not be considered here. Another answer is that the completeness of the definition reflects the completeness of the definor's knowledge of the subject-matter. The reply—and it is the thesis of this article—is that it is the knowledge, not the definition, that is important. A complete and accurate grasp of the subject-matter is in no way dependent upon definition. Yet another answer is that such definitions can be useful to lawyers: in so far as a lawyer's function is analysis, before he can analyse a thing he must have it before him, for which purpose a "clear defining concept" of it is needed to demarcate its province.⁷ Attractive as this appears on the face of it, there are objections to it. In the first place, what is a "concept"? A concept is an abstraction or a collection of abstractions. Abstractions are built up by analysing the factual detail of the thing (whatever it is), and then selecting the elements common to certain groups of facts.⁸ The "concept of the thing" is the stringing together of its abstracted characteristics. Now, in order to arrive at an abstraction, one has to start empirically with detailed facts. No one can

⁵ See King in 11 Camb.L.J., pp. 229, 404 *et seq.* After stating his object to be a definition, "whose analysis displays the maximum degree of coherence to be found amongst the largest number of the most important elements in (a lawyer's professional) experience" (p. 404, also p. 232), he frames his definition (p. 418) running to thirty-four lines of print. The viewpoint adopted is that of the courts.

⁶ Thus, Huntingdon Cairns, *Legal Philosophy from Plato to Hegel* (1949), p. 12, Hart, in his definition of a legal right, *op. cit.*, p. 49. It is not clear whether King himself inclines to this view or not when he says that a definition should organise "the largest number of the most important elements": see the last note. "Largest number" implies that it may not be possible to include all the elements, but at p. 232 he proceeds to say that elements left out must be dealt with somehow. How they are dealt with depends on whether they are "part of the internal structure or of the external relations of law." If they are "part of the internal structure," presumably they must all be included. If so, "important" is pleonastic. On the other hand, if the criteria of "internal structure" and "important" rest on opinion, the definition includes only elements significant to the definor.

⁷ King, *op. cit.*, p. 230.

⁸ Ogden and Richards, *op. cit.*, pp. 113-4, 212-3.

define anything before knowing at least something about it. If, therefore, the lawyer, whose business is knowing the law, gets to know its detail empirically, definitions cease to matter. If he frames one, it will only reflect his grasp of the detail. Even if he starts with the definition, he still has to study the detail in order to know the law. Of what use, then, is a definition demarcating all the boundaries if he is bound to appreciate them in due course? There might be some purpose in framing exhaustive definitions if they are to be authoritative. Since no one (statute apart) is in a position to do this, the final objection here advanced to comprehensive and near-comprehensive definitions is that they will neither dispense with the need for a critical scrutiny of the definor's analysis, nor deter people from embarking on their own analyses.

Books dealing with the detailed rules of law use definitions only as brief indications of the subject-matter, prefatory labels for that which is to be examined. Elaborate definitions are relegated to the province of jurisprudence,⁹ which may be one reason why, as Dicey once said, "jurisprudence stinks in the nostrils of the practising barrister." Now, jurisprudential study may aim at co-ordinating legal and other fields of thought, or at equipping as efficient a lawyer as possible by helping him, for instance, to handle more efficiently the tools of his trade (rights, duties, ownership, possession, precedent, etc.). Jurisprudence deals with generalities at varying levels of abstraction,¹⁰ but whatever the aim or level, its importance lies in the *study*, not in definition. There is no distinction between jurisprudential and other definitions: the distinction, if distinction there must be, is between those which are placed before and those which are placed after the analysis. The former need be no more than labels, the latter may have to be more detailed, since they

⁹ King, *op. cit.*, p. 231: "In his everyday practice a lawyer gets on very passably with vague, imprecise, and even mutually inconsistent notions of law. He has little practical difficulty in identifying the thing or things he is dealing with, and is seldom conscious of the need for, or utility of, refined general concepts. The awareness of the need, and the possible utility of its satisfaction, first arises in the minds of those concerned with the teaching of prospective lawyers, and particularly in the minds of those whose allotted task is to find a province for jurisprudence." It is submitted, however, that even in teaching, in so far as jurisprudence is, or ought to be, a course in how to think rather than what to know, it would be profitable to instruct students in the technique of definition and to encourage them to frame their own definitions, the teacher's definition being only a model.

¹⁰ A study of the lower levels (*e.g.*, how rights, precedent, etc., operate) may be more useful to the barrister than the higher (*e.g.*, what is law?). The aim of equipping as efficient a lawyer as possible will bring in, not only the analysis of legal concepts (analytical), but also, *e.g.*, the impact of branches of the law in society (functional). The utility of these kinds of study is admitted, but quibbles as to whether they should be called "jurisprudence" or not bedevil the question how they are to be taught.

sum up the analysis. They need not be comprehensive; it is sufficient if they embody the salient points of the analysis.¹¹ Since the analysis is the important thing, is it necessary to do even this? The truth is that, beyond labelling the subject at the start, definitions have little use. Where the material is equivocal, perhaps, the definor may wish to underline that fact, or stress his own view, and a concluding definition becomes a convenient way of doing so. Whatever the reason, when such definitions are encountered it should be remembered that they, like all definitions, are only reflective of the definor's analysis.

It follows from all this, firstly, that a definition need only be a label; secondly, that the same word can be defined differently. Seldom is a definition incorrect (unless it states characteristics not possessed by the thing), nor is there any "true" or "only" definition. Thirdly, every definition is governed by the definor's standpoint and purpose and it is either adequate or inadequate for that purpose. One may always question the standpoint and purpose and consider the adequacy of the definition thereby, but criticism of it from other points of view is misconceived. Finally, since a definition is the product of the definor's analysis, it should not be generalised beyond the limits within which it was framed.¹²

II

The submission that a definition only reflects the definor's impression is well illustrated in cases where the nature of the selected characteristics is disputed, for then the definition must depend on the view taken by the definor. "International law" is such a case, and the construction of a definition for it will demonstrate this and certain other contentions advanced so far. Every definition, whether it is *placed* before or after the analysis, must be the result of some analysis.¹³ Hence a knowledge of international law must be presupposed, since the analytical sketches that follow are only the briefest summaries of abstruse and often controversial topics.

¹¹ If the subject-matter is simple, a detailed definition may also retain some elegance. If it is complex, a detailed definition will not be brief, nor vice versa. In no case will definition add to the analysis. Compare King's shorter definitions of law in 10 *Camb.L.J.*, at p. 431, and in 11 *Camb.L.J.*, at p. 236, note 14, with his longer definition, *ibid.*, p. 418.

¹² Austin's definition of Law was based on material gathered almost entirely from English municipal law, but he proceeded to use it as a criterion for laws outside that field. For the resulting verbal artificialities into which he was forced, see Glanville Williams (1945) 22 *British Year Book of International Law*, p. 146.

¹³ The definitions in the standard works on international law are good examples of prefatory definitions: Oppenheim, *International Law*, i, 7th ed., s. 1, Brierly, *The Law of Nations*, 4th ed., s. 1, Lawrence, *The Principles of International Law*, 7th ed., s. 1 (note Lawrence's remark following the definition).

Since international law is a species of man-made law, the simplest defining technique will be adopted, the traditional *per genus et differentiam* method. Now, man-made law is itself only one kind of law. To venture upon a definition of it may border on the temerarious, but only a broad description is required and this might be reached as follows. The word "law," embracing as it does both "scientific" and "man-made" law, might be described as "*patterns of conduct*," in that law primarily concerns behaviour, be it of man or matter. The present standpoint, that of "man-made" law, requires the exclusion of "scientific" law. The word "human" is an obvious addition to the formula, but a better criterion has been provided by Kelsen.¹⁴ He pointed out that scientific laws deal with causes and effects, operating with near-certainty, whereas man-made laws deal with behaviour patterns to which people ought to conform. The latter may thus be distinguished from the former as "*notional patterns of human conduct*," ought-propositions existing in the imagination. Besides patterns of conduct, there is another aspect of man-made law to be taken into account. There are a number of propositions, or rules, which are utilised in legal reasoning. Such, for example, would be the rule in contract that a simple contract requires offer, acceptance and consideration. Man-made law may accordingly be described briefly as "*propositions applicable to, and notional patterns of human conduct*."

Taking this as the *genus*, the *differentiae* of international law here selected are its binding force, subjects, sources and its relation to municipal law. In any definition the characteristics selected are those which the definor regards as distinctive. Once the study of the subject has revealed its characteristics, the reason why one person treats some as more important than others may be interesting, but hardly a matter for profitable argument. The above four have been selected because they appear to the writer to be not only distinctive, but also to underlie almost every part of the subject. Each must now be reviewed briefly to indicate the mental picture in the writer's mind.

Binding Force

Some people contend that law is more than a notional "ought," that it is, and will continue to be, obeyed to a large degree. Hence the belief in a "binding force" behind law. The questions "Why do people obey the law?" and "Why should law be binding?" are founded on different bases. The first proceeds on the fact that the

¹⁴ 50 L.Q.R., p. 474, 51 L.Q.R., p. 517, restated in *General Theory of Law and State* (1945).

behaviour patterns of law are observed to a greater or less degree, the answer to it also furnishing an index of the extent to which law is obeyed. The second is founded on ethical or philosophical criteria. It is unrealistic and, it is respectfully urged, theories attempting to answer it are not in conformity with facts.¹⁵

There seem to be two reasons why States obey international law, if at all: fear and consent.¹⁶ Fear operates through war, reprisals, retorsion, pacific blockade and naval and military demonstrations.¹⁷ They have had comparatively little effect in securing compliance and, in any case, are calculated to deter the weak rather than strong States. In the League of Nations and in the United Nations Organisation fear could also operate through intervention, economic and military sanctions and expulsion.¹⁸ Under the League their effectiveness was impaired by each State deciding for itself whether the Covenant had been infringed or not. Articles 39 and 48 (1) of the United Nations Charter rectify this weakness to the extent that they make such action dependent on the decision of the Security Council, but here the chances of decision are reduced by the veto.¹⁹ Hence, the view that States obey international law as long as it does not militate against their interests to do so does not appear far wrong.²⁰ The protest that this amounts to a negation of its binding force and would promote disobedience is a *non sequitur* and stems from the supposition that there is this impalpable "binding force." In truth, States do not obey or disobey because of any such thing. Whether a given State will abide by a given rule of international law at a given time depends on the interplay of many factors. Obedience seems to rest on a precarious balance between considerations such as a desire to secure fair treatment for its own nationals at the hands of other States,²¹ nationalism, tradition, morality, diplomacy, economic interests and, to some degree, fear. Contrast municipal law, where, whatever

¹⁵ The common will of States binding independently of each (Triepel, *Völkerrecht und Landesrecht*, 1899); the maxim *pacta sunt servanda*, whether an extra-legal assumption (Anzillotti, *Corso di Diritto Internazionale*, 1929), or a rule of law (Cavaglieri, *Lezioni di Diritto Internazionale*, 1925).

¹⁶ Many reasons have been suggested for obedience to municipal law, e.g., indolence, deference, sympathy, fear, reason: Bryce, *Studies in Politics and Jurisprudence* (1901), ii, pp. 1-43.

¹⁷ Oppenheim, ii, pp. 133-51.

¹⁸ Covenant: articles 16 (1) (limited to breaches of articles 12, 13, 15), 16 (2) 16 (4). As to intervention under the League, see Oppenheim, 6th ed., ii, pp. 132-3. Charter: articles 2 (7), 5, 6, 39, 40, 41, 42.

¹⁹ Sanctions were applied in the war between Paraguay and Bolivia, 1934, and between Abyssinia and Italy in 1935. Action under the Charter has taken place in Indonesia, 1947, Palestine, 1948, Korea, 1950. There was no veto by the Soviet Union in the last instance since she was boycotting the United Nations at the time.

²⁰ Notably Jellinek, *Allgemeine Staatslehre* (1900).

²¹ Hurst (1944) 30 *Grotius Society*, at p. 124.

reasons may exist why people submit to the law, there is effective machinery for dealing with failures and refusals to submit. It is that which distinguishes international law from municipal law, this absence of enforced obedience. The phrase "*propositions applicable to, and notional patterns of human conduct*" may therefore be retained unaltered, the word "notional" adequately conveying the lack of enforcement.

Subjects

The word "subject" may mean either an entity of whose existence the law takes cognisance, or an entity having rights and/or duties. The latter sense is preferable, since it appears to be the generally accepted legal meaning.²²

The personality of States cannot seriously be questioned.²³ The doubt is whether they are the only subjects, a matter that has been explored elsewhere.²⁴ It has been pointed out that there have been bodies, such as the Holy See between 1871 and 1929, recognised belligerents and the British Dominions before achieving statehood, all of which were subjects of international law in both the above senses. There are also other groups, whose alleged personality rests on treaty, such the United Nations Organisation. In some of these cases the treaties are cautious on the question of personality, while in others they only impose obligations on States to enable these bodies to function within their territories.²⁵ These bodies have entered the pale of international law in various ways. The United Nations Organisation, for instance, entered into a treaty with the United States in 1947 as to its headquarters at Lake Success, and the International Court of Justice has recognised its procedural capacity before the Court; so, too, with other similar bodies.²⁶ Thus, to a limited extent, they all fall within even the narrower meaning of subject.

²² Salmond, *Jurisprudence*, 10th ed., p. 318, Holland, *Jurisprudence*, 13th ed., p. 94, Gray, *The Nature and Sources of the Law*, 2nd ed., p. 27. Kelsen will quarrel with the notion of an entity "having" rights, etc., since in his view legal personality is a grouping of rights, treated as an unit, but this is not germane to the present discussion.

²³ There has been a view that States are but collections of individuals and that it is they on whom rest the rights and duties. On this hypothesis, *cadit quaestio*. See Duguit, *Traité de droit constitutionnel*, 3rd ed., i, pp. 713, *et seq.*, Scelle, *Précis de droit des gens*, i, pp. 42 *et seq.*, and *Manuel élémentaire de droit international public*, p. vii.

²⁴ Lauterpacht in 63 L.Q.R., p. 438, and *International Law and Human Rights* (1950) pp. 12 *et seq.*, C. W. Jenks in 22 B.Y.I.L., p. 267, where the literature is cited.

²⁵ e.g., United Nations Charter, article 104; Lauterpacht, 63 L.Q.R. at pp. 446-50, *Human Rights*, pp. 14-23, Jenks, *op. cit.*, pp. 272-3.

²⁶ Advisory Opinion on the *Reparation for Injuries Suffered in the Service of the United Nations* (1949) I.C.J. Reps., p. 174, especially pp. 178, 179; Lauterpacht, *Human Rights*, pp. 16 *et seq.* For a municipal decision, see *International Institute of Agriculture v. Profili* (1929-30) Ann.Dig. Case 254.

As to individuals, their rights and duties at international law should be considered separately. There is nothing in principle why they cannot have rights.²⁷ The question is, have they rights in fact? In most cases the right is not in the individual, but in his State.²⁸ There have been impressive declarations as to the so-called "fundamental human rights," but they do not confer rights on individuals any more than the law of cruelty to animals confers rights on animals. If anything, duties have been imposed by treaty on the signatory States, while the rights of the individual, if at all, come from the municipal law of his State. In one type of case, however, individuals do appear to have acquired rights. On occasions the individuals of a given State have acquired rights under a treaty to which that State was a party, provided the clear intention of the treaty was to confer rights specifically on them.²⁹ If the treaty expresses no such intention, tribunals have shown reluctance in recognising individual rights under it,³⁰ and furthermore, even when the treaty provides benefits for individuals, but not specifically nationals of the signatory State, they do not always acquire rights.³¹

Turning to the duties of individuals, two cases may be dismissed at once. The first is that of pirates. All that international law does is to permit States to extend their municipal jurisdiction to the

²⁷ Article 34 (1) of the Statute of the International Court denies procedural capacity to individuals, but Lauterpacht has pointed out that "the existence of a right and the power to assert it by judicial process are not identical": 63 L.Q.R., at p. 455, 64 L.Q.R., at p. 97, *Human Rights*, at pp. 27, 54. Moreover, there have been instances of such capacity conferred by treaty: Convention XII of the Hague Conference, 1907, the Central American Court of Justice, 1907, Treaty of Versailles, 1919, articles 297, 304 (b), *Steiner & Gross v. Polish State* (1927-8) Ann.Dig. Case 188. It is also said that individuals cannot make treaties, but this is no reason why they may not have rights in other ways. Finally, it has been said that, the "adjective law" side of international law being war, a subject of a right is one who can make war, i.e., only States (Idelson, 30 Grotius Society, at p. 54). Even conceding the premise that war corresponds to "enforcement action," the fact that individuals have no power of enforcement does not imply incapacity for rights.

²⁸ *Panvezys-Saldutiskis Railway Case* (1939) P.C.I.J., Ser. A/B, No. 76, at p. 16. President Coolidge: "The person and property of a citizen of the United States are a part of the general domain of the United States as a nation, even abroad," quoted by E. Kaufman in *Recueil*, liv, p. 409. See also the so-called Rule as to Nationality Claims, Oppenheim, i, pp. 314-5, and 63 L.Q.R., at pp. 456-7.

²⁹ *Jurisdiction of the Courts of Danzig* (1928) P.C.I.J., Ad. Op., 15, *Papadopoulos Case* (1927-8) Ann.Dig. Case 285 (ambiguous on this point); *McCandless v. U. S.* (1927-8) Ann.Dig. Case 363 (overruled on another point, *ibid.*, Case 364); *Noujaim Case* (1931-2) Ann.Dig. Case 217a; *Zoppot Street Crossing Case* (1933-4) Ann.Dig. Case 104. Attempts to explain these rights otherwise than as creations of treaty law, see Oppenheim, i, p. 581, n. 4.

³⁰ *Martini Case* (1929-30) Ann.Dig. Case 93; *Extradition Case*, *ibid.*, Case 167; *U. S. v. Insull* (1933-4) Ann.Dig. Case 75; *Ex p. Lopez*, *ibid.*, Case 76; cf. *Re Jolis*, *ibid.*, Case 77.

³¹ *Civilian War Claimants' Association v. R.* [1932] A.C. p. 14; *Administrator of German Property v. Knoop* [1933] Ch. p. 439; *The "Zeischip Nest"* (1935-7) Ann.Dig. Case 117.

high seas. The other case is based on the argument (to be considered later) that as international law is *per se* part of municipal law, individuals may be proceeded against for breaches of duties derived from international law. It is arguable both ways that this is a breach of international or municipal duty.³² The only clear instance of a duty comes from treaty. The Four Power Agreement of August 6, 1945, established an International Military Tribunal to punish individuals proved guilty of specified offences, and the trial of war criminals at Nuremberg went even further in that punishment was meted out, *inter alia*, for contravention of the Briand-Kellogg Pact, 1928. The rights and duties of individuals thus seem to rest to a very limited degree on treaties. Whether this makes them subjects of international law in the narrower sense of the term depends on how far treaty-law is "international law." That is a verbal point, but it is submitted that in so far as the term "international law" usually embraces treaty-law, the answer is in the affirmative.³³

The above outline shows that, while States are indubitably subjects, there is some doubt as to the other group-entities and a great deal more doubt as to individuals. The definition need only convey the broad picture. Accordingly, the addition of "for States primarily" to the provisional definition will accomplish this, the word "primarily" indicating that States, although the usual and, indeed, the most important subjects, may not be the only ones. The reference to "States" makes the word "human" redundant. So, the definition will now read: "*propositions applicable to, and notional patterns of conduct for, States primarily.*"

Sources

The definition as it stands will cover international morality as well as law. To distinguish between them, it is submitted, the best criterion is that of the courts. Bound up with courts is the topic of sources, for there is no such thing as a "source" in the air; it is relative to a particular court. In the international field, three types of tribunals must be taken into account, the International Court of Justice, other international tribunals and, occasionally, municipal courts.

The sources for the International Court of Justice are prescribed in Article 38 of the Statute of the Court. Paragraph (1) says that

³² *Respublica v. De Longchamps* (1784) 1 Dallas p. 111, (where an individual was punished by an American court for an offence allegedly against international law) may only be an instance of international law becoming part of American municipal law.

³³ The wording of article 38 of the Statute of the International Court clearly contemplates treaty-law as "international law."

the Court shall apply general and particular treaties,³⁴ custom, general principles of law and, subject to Article 59, judicial decisions and writings of jurists. Paragraph (2) proceeds to give the Court power to decide *ex aequo et bono* if the parties agree. Treaties, custom and general principles of law require no elaboration here.³⁵ Judicial decisions and writers are to be resorted to subject to Article 59, which says, "The decision of the Court has no binding force except between the parties and in respect of that particular case."³⁶ The implication of paragraph (2) must not be overlooked, which is that the Court is to apply international law unless the contrary has been agreed between the parties.

The Statute of the Court is not binding on other international tribunals. The sources to which they resort are, none the less, similar. Treaties and custom are obvious, the treaty establishing the tribunal may also specify the law to be applied.³⁷ General principles may be resorted to,³⁸ and judicial decisions and writers exercise persuasive authority. An award is not necessarily final as in the International Court, that is, the doctrine of *res judicata* does not apply.³⁹ Finally, as before, international law will be applied unless the parties agree to the contrary.

Halting there for the moment, these points necessitate a further modification of the definition: "*propositions applicable to, and notional patterns of conduct for, States primarily, which are normally binding on international tribunals.*" The word "normally" will, it is hoped, convey the idea that international law is binding on these courts, unless there is stipulation to the contrary.

³⁴ The distinction sometimes drawn between general treaties as "law-making" as opposed to particular treaties has been rejected, Lauterpacht, *Private Law Sources and Analogies of International Law* (1927) pp. 156-9. It is said that all treaties are "law-making" in that they prescribe patterns of conduct for the signatories and no others.

³⁵ As to general principles especially, see Lauterpacht, *Function of Law in the International Community* (1933) Pt. III, *passim*.

³⁶ Implicit herein are the doctrines of *res judicata*, or the finality of concluded litigation, which is expressly adopted by the article, *stare decisis*, or the compulsory following of prior decisions, which is expressly rejected, and *precedent*, in the wide sense of using previous decisions as patterns, as to which the article is silent. The doctrine of *precedent* seems to have been adopted, e.g., *Corfu Channel Case: Judgment on the Preliminary Objection* (1948) I.C.J. Reps., p. 15, following *Minority Schools in Upper Silesia Case* (1928) P.C.I.J., Ser. A, No. 15; *Corfu Channel Case: Judgment on the Merits* (1949) I.C.J. Reps., p. 4, following *Chorzow Factory Case* (1927) P.C.I.J., Ser. A, No. 13. Municipal decisions have likewise been followed, e.g., *Lotus* (1927) P.C.I.J., Ser. A, No. 10, in the absence of international authority.

³⁷ e.g., in the British Guiana Arbitration, 1898, the treaty specified fifty years as the period of prescription: Rule A of article 4.

³⁸ e.g., in *Eastern Exchange, etc., Telegraph Co., Ltd., Case* (1923-4), Ann. Dig. Case 225.

³⁹ Oppenheim, ii, pp. 26-9.

The sources to which a municipal court will turn for international law still remains to be considered. Since this is intimately connected with the relationship between international and municipal law, it is there that the answer must be sought.

Relationship between international and municipal law

The doctrine of incorporation, as maintained by the Monists, is that international law is *per se* part of municipal law.⁴⁰ The question is not whether international law could be *per se* part of municipal law, but how far it is so in fact. It is not possible to agree or disagree with the proposition as stated. "Municipal law" must be related to the law of a given country, and "international law" for this purpose must be subdivided into conventional and customary law. The topic will be considered mainly with reference to the law of Great Britain and, owing to the one-sided attention which it has hitherto received, needs to be discussed rather fully.

As to conventional law, it is agreed that this is not *per se* part of British municipal law, that is, treaties have to be adopted and made part of the law of the land by statute before a court can apply them. Treaties involving changes in the law, or cessions of territory require legislation,⁴¹ and *The Parlement Belge*⁴² and *Walker v. Baird*⁴³ show that in the absence of an enabling Act courts will refuse to apply the provisions of a treaty against a British subject. A possible exception may be treaties regulating belligerent rights and affecting prize courts, but these courts are in a category of their own and do not administer the law of the land.⁴⁴

Before discussing the extent to which customary international law is *per se* part of English law, it is necessary to delimit the scope of the question. In the first place, no rule of international law can override a rule of statute law.⁴⁵ *Mortensen v. Peters*⁴⁶ makes clear two points: (a) a British court will, where possible, avoid holding

⁴⁰ Lauterpacht, 25 Grotius Society, p. 51, *Private Law Sources and Analogies*, p. 75n., Oppenheim, i, pp. 37 *et seq.*; Dickinson, 26 A.J., p. 239; Scott, 1 A.J., p. 831; Westlake, 22 L.Q.R., p. 14 (reprinted, *Collected Papers*, p. 498); McNair, 30 Grotius Society, p. 11.

⁴¹ McNair, 9 B.Y.I.L., p. 59, *passim*.

⁴² (1879) 4 P.D. 149, reversed on another point, 5 P.D. 197.

⁴³ [1892] A.C. 491. See also Canadian cases, *Re Arrow River and Tributaries Slide and Boom Co., Ltd.* [1932] 2 D.L.R. 250; *Att.-Gen. Ontario v. Att.-Gen. Canada* [1937] A.C. 326.

⁴⁴ In the United States treaties are a part of the law of the land, Constitution, article 6, and see *State of Missouri v. Holland* (1920) 252 U.S. 416, (1919-22) Ann.Dig. Case 1.

⁴⁵ The statement of Lord Mansfield in *Heathfield v. Chilton*, 4 Burr. at 2016, that "The Act of Parliament, 7 Anne, c. 12, did not intend to alter nor can alter the law of nations," is not taken seriously even by supporters of the doctrine of incorporation.

⁴⁶ (1906) 14 S.L.T. 227. See also *Naim Molvan v. Att.-Gen. Palestine* [1948] A.C. 351; Lord Porter in *Theophile v. Sol.-Gen.* [1950] A.C. at 195.

that there is a conflict between statute and international law, but (b) if there is a conflict, it will follow the statute. The point need scarcely be laboured, since it is admitted by the Monists.⁴⁷

Secondly, no rule of international law can override a rule of the common law.⁴⁸ Conflict seems to have arisen in connection with the international doctrine of State succession and the common law doctrine of "act of State." In *Cook v. Sprigg*⁴⁹ the Privy Council refused to recognise as binding on the Crown concessions which had been granted to Cook by the Chief of Pondoland. In *West Rand Central Gold Mining Company v. R.*⁵⁰ a Petition of Right alleging that the Crown should be bound by the tortious obligation of its predecessor, the Republic of South Africa, was dismissed. Notwithstanding certain dicta by Lord Alverstone C.J., there is nothing to suggest that the case was decided otherwise than in accordance with the principles of common law.⁵¹ The most that can be inferred from it is that a British court prefers to avoid having to say that there is a conflict; indeed, the noble and learned judge doubted whether there was any settled rule of international law on that point.⁵²

Thirdly, supposing that there is no rule of statute or common law. It is submitted that in this event a British court *may* apply a rule of international law, but only if it thinks fit.⁵³ If this is all that is meant by saying that international law is *per se* part of British municipal law, it is hardly worth saying. The phrase "*per se*" seems to imply more than this. Now, it is agreed that treaties are not *per se* part of English law, that is, not binding automatically on courts. To say that customary international law is *per se* a part can only mean that courts *must* (not *may*) follow international law in default of statute or common law. If this is true, then books on constitutional law and jurisprudence as to the whereabouts of legal sovereignty need to be revised. Among writers of such books, however, there prevails a seeming conspiracy of silence. A further

⁴⁷ 25 Grotius Society at p. 76, 30 *ibid.*, at p. 13.

⁴⁸ Here, too, the supremacy of the common law has been admitted: 25 Grotius Society, at pp. 76-7, Westlake, *op. cit.*, p. 509.

⁴⁹ [1899] A.C. 572.

⁵⁰ [1905] 2 K.B. 391.

⁵¹ "The opinions of text-writers that a conquering State was liable for the obligations of the conquered State were rejected not because they were contrary to international law (a question not discussed), but because they were contrary to principles of English law laid down in cases like *Campbell v. Hall*, 1 Cowp. 204": Jennings, *The Law and the Constitution*, 4th ed., pp. 160-61n.

⁵² Jennings doubts whether the decision would have been different even if there had been a rule of international law, *op. cit.*, *loc. cit.*

⁵³ For the attitude of British courts towards international law sources generally, see *The Maria*, 1 C.Rob. at pp. 359 *et seq.*; *R. v. Keyn* (1876) L.R. 2 Ex.D. at pp. 202 *et seq.*; *McCartney v. Garbutt* (1890) L.R. 24 Q.B.D. at pp. 369 *et seq.*; *Re Piracy Jure Gentium* [1934] A.C. at 588.

point: the mere fact that a court has followed a rule of international law does not prove the Monistic assertion. The question is, *why* did it do so? This touches the heart of the matter. If it appears that the courts, when they follow international law, do so because they are bound, the Monistic assertion is proved; if they do so only as a matter of discretion, it is not proved. For instance, the Court of Appeal once adopted Sir Arthur Goodhart's summary of American law as to the position of rescuers.⁵⁴ No one suggests that American law or the opinions of modern writers are now *per se* part of English law. Similarly, there have been occasions when British courts, in the exercise of their discretion, have followed rules of international law. Such cases are not conclusive, for nothing in them suggests that the courts were bound to do so.⁵⁵

Authority in support of the proposition is, it is submitted, inadequate. Foremost stands a passage from Blackstone to the effect that "... the law of nations ... is here adopted in its full extent by the common law, and is held to be a part of the law of the land."⁵⁶ This must be taken in its context, which is commercial law. At that date English law did not boast of a body of mercantile law, so resort was had to the Law Merchant, which was international in character. Apart from Blackstone, an array of judicial dicta has been cited, some impressive, but mostly from old cases. Dicta are not authoritative and must be understood subject to the *rationes decidendi* of the cases. When these are examined, a curious fact emerges. A large number of the cases concern one topic, diplomatic immunities, and are in fact decided on an Act of Parliament, 7 Anne, c. 12 (Diplomatic Privileges Act, 1708), not on international law.⁵⁷ The Preamble to the Act says, in effect, that it is declaratory of the common law, and many of the dicta merely reflect this. The implication is that the provisions of the Act were already a part of the common law. As to this, (a) even if it is true that the common law had previously adopted rules of international law, there is no proof that such adoption had been because international law was binding. (b) The common law, however, had no doctrine about

⁵⁴ *Haynes v. Harwood* [1935] 1 K.B. 146.

⁵⁵ *De Wutz v. Hendricks*, 2 Bing. 314; *Commercial Estates Co. of Egypt v. Board of Trade* [1925] 1 K.B. 271.

⁵⁶ *Commentaries*, IV, Chap. 5, p. 67.

⁵⁷ *Barbuit's Case*, Forrester's Cases, temp. Talb. 281; *Triquet v. Bath*, 3 Burr. 1478, 1480; *Lockwood v. Coysgarne*, 3 Burr. 1676, 1678; *Heathfield v. Chilton*, 4 Burr. 2015, 2016; *Darling v. Atkins*, 3 Wilson, 33, 35; *Hopkins v. De Robeck*, 3 T.R. 79, 80; *Viveash v. Becker*, 3 M. & S. 284; *Novello v. Toogood*, 1 B. & C. 554, 562; *Service v. Castaneda*, 2 Coll. 56, 59; *Magdalena Steam Navigation Co. v. Martin*, 2 E. & E. 94, 114; *Parkinson v. Potter* (1885) 16 Q.B.D. 152, 157; *Musurus Bey v. Gadban* [1894] 2 Q.B. 352, 361; *Re Suarez* [1918] 1 Ch. 176, 192, 196; *Engelke v. Musmann* [1928] A.C. 443, 449.

diplomatic immunities before the Act.⁵⁸ Indeed, the circumstances in which the Act was passed are revealing. The Czar's ambassador was publicly arrested for debt, an indignity which annoyed the Czar. When the persons concerned in the arrest were prosecuted in the Court of Queen's Bench, the jury found the facts proved against them, but the question of law whether they amounted to an offence was reserved for argument and was never decided. The Act was then passed, an illuminated copy of which was presented to the Czar, since when it has been referred to as the "Act of Apology." If the rules of international law were already part of the common law, why this hesitation as to the guilt of the accused, and why no conviction? The implication is rather that the common law had no rule. In the light of these circumstances, the Preamble becomes a piece of rhetoric to appease the Czar. (c) If the common law already had the rule of international law incorporated in it, what was the need for an Act at all? ⁵⁹ The question gains significance when it is borne in mind that legislation was resorted to sparingly in those days. It is submitted, therefore, that these cases were decided under municipal law and that the dicta suggesting the contrary are of little value.⁶⁰

Cases not decided under the Act of Anne are not conclusive either. In *De Wutz v. Hendricks* ⁶¹ there was no rule of the common law and a rule of international law was adopted, but nothing in the case, or in the dicta, suggests that it was binding. In *Emperor of Austria v. Day and Kossuth* ⁶² the Court of Chancery issued an injunction restraining the defendants from printing Austrian currency. The decision was based on the Act of Parliament, 11 Geo. 4 & 1 Wm. 4, c. 66, making it a felony to counterfeit foreign paper money. *R. v. Keyn* ⁶³ is inconclusive either way. In *Commercial Estates Company of Egypt v. Board of Trade*,⁶⁴ a case involving the right of angary, the rule of international law was followed in

⁵⁸ Adair, *Exterritoriality of Ambassadors in the Sixteenth and Seventeenth Centuries*, and see 25 Grotius Society, at p. 53.

⁵⁹ See the pertinent remarks of Lord Ellenborough C.J. in *Viveash v. Becker*, 3 M. & S. at 292, 298.

⁶⁰ It may be asked, not very seriously, how the doctrine of incorporation is reconcilable with the orthodox theory that judges never make law, but only declare existing law. The common law is theoretically deemed to have existed since before 1189, at which date international law could hardly be said to have been a part of it. The orthodox theory has been rightly castigated as a "childish fiction," but it is interesting to observe that Blackstone was one of its supporters and one wonders how many of the judges, whose dicta lend colour to the doctrine of incorporation, would also have upheld the traditional theory of the common law.

⁶¹ 2 Bing 314, perhaps the best authority, but see Jennings's comment on it, *op. cit.*, *loc. cit.*

⁶² 2 Giff. 628.

⁶³ (1876) L.R. 2.Ex.D. 63.

⁶⁴ [1925] 1 K.B. 271.

the absence of other authority, but Atkin L.J. was emphatic in repudiating any suggestion that it was binding. "International law, as such," he said,⁶⁵ "can confer no rights cognisable in the municipal courts. It is only in so far as the rules of international law are recognised as included in the rules of municipal law that they are allowed in the municipal courts to give rise to rights or obligations." Again, in the *Cristina*⁶⁶ Lord Macmillan, after quoting Lord Dunedin to the effect that "there is no such thing as a standard of international law extraneous to the domestic law of a kingdom, to which appeal may be made," proceeded to prescribe the conditions under which an English court will adopt a rule of international law. In *Chung Chi Cheong v. R.*⁶⁷ Lord Atkin said again, "It must be always remembered that, so far, at any rate, as the courts of this country are concerned, international law has no validity save in so far as its principles are accepted and adopted by our own domestic law. There is no external power that imposes its rules upon our own code of substantive law or procedure. The courts acknowledge the existence of a body of rules which nations accept among themselves. On any judicial issue they seek to ascertain what the relevant rule is, and, having found it, they will treat it as incorporated into the domestic law, so far as it is not inconsistent with rules enacted by statutes or finally declared by their tribunals." Scott L.J. declared in *The Tolten*,⁶⁸ "Where there is a doubt about some rule or principle of our national law, and one solution of the doubt would conform to the general law and the other would produce divergence, the traditional view of our Admiralty judges is in favour of the solution which will produce uniformity." Finally, in *Theophile v. Solicitor-General*⁶⁹ Lord Porter said, "If the meaning of an Act of Parliament is ambiguous, that doctrine (comity of nations) may be prayed in aid, but, where an English statute enacts a provision in plain terms, no such principle applies." It would thus appear that a British court may adopt a rule of international law, not because it is bound in any way, but as a matter of discretion and, not the least, through a desire to "keep in step."⁷⁰

The position in other countries, however, provides more support for the Monistic doctrine than Great Britain. In the United States customary international law is *per se* part of municipal law, if not

⁶⁵ *Ibid.*, at 295.

⁶⁶ [1938] A.C. at 497-8.

⁶⁷ [1939] A.C. at 167-8. In *Anglo-Iranian Oil Co., Ltd. v. Jaffrate* [1953] 1 W.L.R. at 253, only the latter part of Lord Atkin's dictum was quoted.

⁶⁸ [1946] P. at 142. See also Scott L.J. in *R. v. Bottrill* [1947] K.B. at 50.

⁶⁹ [1950] A.C. at 195.

⁷⁰ The Canadian case of *Re Drummond Wren* [1945] 4 D.L.R. 674 is more in accordance with this explanation than the doctrine of incorporation.

in conflict with the Constitution and statute law, while with statutes there is a presumption that they do not intend to override international law.⁷¹ Article 25 of the Bonn Constitution, May 23, 1949, makes international law a part of German municipal law without any further act of incorporation.

The conclusion is clear. International law is binding on the courts of some countries only. It only needs the addition of this touch to give the definition its final form : “ *Propositions applicable to, and notional patterns of conduct for, States primarily, which are normally binding on international tribunals and the courts of some countries.* ” Even if this definition were to appear at the head of a discussion on international law, it is only a summary of certain points of an analysis and as such can lay no claim to being a magic formula.⁷²

⁷¹ *Respublica v. De Longchamps* (1784) 1 Dallas, 111; *Paquete Habana and Lola* (1899) 175 U.S. 677.

⁷² The writer is greatly indebted to Mr. J. W. C. Turner and Dr. K. Lipstein for suggestions and criticisms.

THE ARMY ACT AND MURDER ABROAD¹

M. J. PRICHARD

PAGE was not the first British soldier to "murder" a foreigner on foreign soil, nor was he the first to be tried and convicted by a court-martial for so doing. He was, however, the first to take advantage of the passing of the Courts-Martial (Appeals) Act, 1951, upon such a conviction.² His case thus provided at last an authoritative ruling on a point which had previously been the silent responsibility of the Judge Advocate General, namely, whether such a killing could indeed be murder within the meaning of section 41 of the Army Act, 1881.

An acting corporal in the Royal Corps of Signals, Page was stationed in the Canal Zone of Egypt in the troubled days of 1952 and was there convicted by a General Court-Martial of the murder of an Egyptian national in an Egyptian village. The sentence of death was commuted by the confirming officer to one of seven years' imprisonment.³ Page was convicted of an offence against military law: by section 41 of the Army Act, "every person who, whilst he is subject to military law, shall commit any of the offences in this section mentioned shall be deemed to be guilty of an offence against military law, and if charged under this section with any such offence (in this Act referred to as a civil offence) shall be liable to be tried by court-martial, and on conviction to be punished as follows: . . . (2) If he is convicted of murder, be liable to suffer death." As a member of the British Forces Page was immune from the criminal jurisdiction of the courts of Egypt,⁴ but that same status undoubtedly rendered him subject to military law and therefore to the jurisdiction of a court-martial under this section. Equally undoubted was the jurisdiction of the particular

¹ This subject was first suggested by Mr. E. Garth Moore, whose help has been invaluable. The writer is also indebted to Lt.-Col. G. I. D. Draper for his kind assistance, and to the Librarian of the War Office for permission to use its Library.

² *R. v. Page* [1954] 1 Q.B. 170.

³ The sentence has since been suspended, and Page released, *The Times*, December 16, 17, 1953.

⁴ Art. 4, British-Egyptian Convention concerning the Immunities and Privileges to be enjoyed by the British Forces in Egypt, annexed to the Treaty of Alliance, T.S. No. 6 (1937).

court-martial, since it was convened in the place where the offence was committed.⁵

Page was forced, therefore, to deny that the offence had been committed. He was granted leave to appeal to the Courts-Martial Appeal Court on the ground that murder had not been committed since the deceased was not within the Queen's Peace at the time of his death. Put as the judgment puts it, the appellant's argument looks like a plea to the jurisdiction, "that a court-martial could only try a case of murder if it came within this [Coke's] common law definition, and could not try one in which recourse had to be made to statutory provisions which had made murder committed abroad triable and punishable in this country."⁶ But Page was charged with an offence against military law, and no question of jurisdiction arose. The appeal was brought solely upon the proper definition of that offence.

The argument for the appellant was straightforward. Section 41 speaks simply of murder; that word must be given its common law meaning; for that meaning one must turn to Coke's classic definition: "Murder is when a man . . . unlawfully killeth within any county of the realm any reasonable creature *in rerum natura* under the king's peace, with malice forethought. . . ."⁷

Something had to be jettisoned. As it stood, the definition could not possibly serve: Coke's restriction to killings within the realm would make nonsense of section 41, and any limitation to the Queen's dominions would make its interpretation very difficult. Counsel was prepared, therefore, to concede that killing on foreign soil might be murder, but only where both killer and victim were British subjects. He endeavoured to found this qualification on cases decided on those statutes which had conferred upon the common law courts a power to try murder committed abroad. Rather illogically, however, he would have nothing to do with the last of these statutes, the Offences against the Person Act, 1861. This was understandable, for section 9 of that Act clearly rendered triable as murder the killing by a British subject of a foreigner on foreign soil. This section, counsel contended, "did not extend the meaning of 'murder' at common law, but created an offence unknown to the common law."⁸

⁵ By the Army Act, s. 159, the court-martial would apparently have had jurisdiction if it had been convened elsewhere. Under the very similar section in the Mutiny Acts, however, a distinction seems to have been drawn between purely military offences, which might be tried anywhere, and ordinary crimes, which were triable only in the place where the offence was committed. See Clode, *Military Forces of the Crown*, i, p. 187, and the opinions of Law Officers cited by him. These were, however, given before the section was inserted in the Mutiny Acts in 1770.

⁶ [1954] 1 Q.B., at p. 174.

⁷ 3 Inst. 47.

⁸ [1954] 1 Q.B., at p. 173.

THE BACKGROUND IN THE ORDINARY CRIMINAL LAW

In view of the appellant's argument, it is not surprising that a consideration of the Offences against the Person Act and its background formed the major part of the judgment. The starting point of the court's investigations was the statute 33 Henry 8, c. 23. This was not the "first Act concerning a crime committed abroad," as the court suggested, but it was apparently the first under which *murder* committed on foreign soil became triable by the common law courts.⁹ The possibility of the offence's being committed abroad is suggested in the usual Tudor preamble, which recites the practice of bringing "from divers the shires and places of this Realme and other the King's Dominions" persons accused of high treason, petty treason, misprision of treason, and murder, to be examined by the Council. The actual authority for the trial of offences committed abroad is derived from two vital but unobtrusive words in the first section, which enacts that persons charged with any of the four offences may, after examination by the Council, be tried in any county of the realm, whether the offence were committed "within the King's Dominions or without." The statute was later construed as giving to the common law courts an extra-territorial jurisdiction, but this was probably no part of its original purpose. Clearly not in the case of treason, for such a jurisdiction already existed¹⁰; and in the case of murder the Act would hardly have burdened the Council for such a purpose, since that body does not appear to have made a practice of examining persons accused of that offence.

What then was the purpose of the statute? There is nothing in the register of the Council, begun in 1540, which indicates whether the measure was prompted by any particular incident.¹¹ Its passage through Parliament was uneventful.¹² The bill was introduced in the Lords on January 25, 1542, and received its second reading the following day. There was then a short delay while the House busied itself with the attainder of Catherine Howard. On February 1 the bill was read a third time and sent to the Commons, who returned it on the 8th. Clearly the measure was not controversial. Its purpose appears to have been quite simply that stated in the preamble. The Council had no power of life and death over the persons it examined; for that it had to turn either to Parliament or to common law. Compared with the former, the latter course was cumbersome, for the accused had

⁹ *Ibid.*, at p. 175. See 26 Hen. 8, c. 13, and 32 Hen. 8, c. 4.

¹⁰ See the statutes cited, note 9.

¹¹ See Nicholas, *Proceedings and Ordinances of the Privy Council*, vol. 7.

¹² 1 *Lords' Journal*, pp. 169b *et seq.*

to be returned to the county where he had offended for the formality of a trial. The statute aimed at avoiding the delay and expense of returning the prisoner by making him triable in *any* county, and thus assisted Henry in his seasonal occupation of "clearing the Tower."

It therefore contemplated, first and foremost, treason committed within the realm : treason, because it was treason, not murder, that occupied the time of the Council ; treason committed within the realm, because treason committed abroad was already triable in the county of the King's choice.¹³

Why then was murder alone included with treason ? The distinction between murder and other felonies might appeal to a modern mind, but the Tudor draftsman would have thought more readily of clergyable and unclergyable offences.¹⁴ The records of the Council do not indicate that it had paid any greater attention to murder than to other felonies, nor do they reveal any particular case of murder which might have prompted the enactment.¹⁵ Perhaps the inclusion of murder was accidental, rather than the exclusion of other felonies deliberate : the association of murder with petty treason is quite natural.

The act soon ceased to fulfil the purpose for which it was intended, for it was repealed in 1554 by 1 & 2 Philip and Mary, c. 10, as regards treason committed within the realm.¹⁶ Thereafter, ironically enough, the role of the Council was reversed, the procedure proving a useful method of having a case tried elsewhere than in its proper county. But no one, not even Coke, who was well aware of the statute,¹⁷ saw in it a means whereby the common law courts might try a case of murder committed abroad.¹⁸ There is a suggestion of such a use in 1677 in the trial of one Hutchinson for a murder committed in Portugal,¹⁹ but the first clear decision on the point was that by Holt C.J. in 1709 in the case of Chambers, who was tried for a murder committed in Barcelona.¹⁹ The Chief Justice remarked, however, that the case was not within the mischief recited by the Act.

The only question which then remained was whether this statutory jurisdiction extended to a killing on foreign territory when the victim was not a British subject. This part of the story is

¹³ See 23 Hen. 8, c. 1.

¹⁴ Nicholas, *op. cit.* Nor do the *Letters and Papers of Henry VIII* shed any light on the matter.

¹⁵ Dyer 131.

¹⁶ See 3 Inst. 26.

¹⁷ Treason committed abroad, which might have suggested this use, was dealt with under the later 35 Hen. 8, c. 2. Dyer 131, 298, 360.

¹⁸ Mentioned in 1 Shower 6. 3 Keble 785 is confused and confusing.

¹⁹ Mentioned in *R. v. Athos*, 8 Mod. 144.

straightforward and may easily be traced through the present case. It need only be said here that doubts left by the cases of *R. v. Sawyer*²⁰ and *R. v. Helsham*²¹ were finally laid to rest by section 9 of the Offences against the Person Act, 1861.

These two cases were, however, the foundation of the appellant's argument as to the common law meaning of murder, and, in dismissing the appeal, the court quite naturally based its judgment on the Act of 1861. The decision was undoubtedly correct, not so the route by which it was reached. It involved the rather doubtful step of considering the historical background of one Act of Parliament and deducing therefrom the meaning of a word contained in another. This might have been permissible if there had been any connection between the two statutes, but the only link was provided by the statement that the court had "no doubt that when the word 'murder' is found in a statute it has the meaning which has always been attached to it throughout the ages, namely, an unlawful killing with malice aforethought."²² Page, it must be remembered, was charged with an offence under section 41 of the Army Act. The purpose of that section was reasonably clear without the need to resort to history; but if resort to history were had at all, then it should have been to the history of section 41, not to that of the Offences against the Person Act.

THE BACKGROUND IN MILITARY LAW

Section 41 is but the last of a line of enactments, prerogative and statutory, which go back centuries beyond the statute 33 Henry 8, c. 23. Since before the Conquest, English law has recognised that a soldier has not only his purely military duties, but civil obligations also. Among these are the duties of the criminal law, which he owes to all persons he meets, the King's enemies alone excepted. The criminal law accompanies him wherever he goes, as well beyond the seas as within the realm, for it is enforceable by military courts as part of the military code.

Till the Settlement of 1689 this code was contained in the Articles of War made under the prerogative on the raising of an army.²³ The form of these Articles changed very little throughout

²⁰ (1815) Russ. & Ry. 294. See (1845) 2 C. & K. 53, 101.

²¹ (1830) 4 C. & P. 394.

²² [1954] 1 Q.B., at p. 177. The writer's italic.

²³ Articles of War are elusive documents. They are impossible to trace under that title. The only satisfactory collection is contained in the War Office Library, but a complete list of their whereabouts is to be found in the *Journal of the Society of Army Historical Research*, iii, 166, v, 202, and vi, 188.

the centuries, and invariably some provision was made for the protection of civilians. By Richard II's "Statutes, Ordonnances and Customs to be observed in the Army" (1385) soldiers guilty of rape were to be hanged. Henry V's troops in France were punished in the same way; so, too, within the realm, were the men raised by Henry VII for the battle of Stoke.²⁴ Henry VIII's Articles of 1544 provided that "noe man murder or robbe anie person, except he bee the king's enemy, ne ravishe anie woman, upon payne of death."²⁵ That "Murther shall be expiated with the death of the murtherer" was the rule for both sides in the Civil War, for the Laws and Ordinances of the Earl of Northumberland, issued in 1640 for Charles's army, were adopted (without acknowledgment) by the Earl of Essex.²⁶

With the advent of the Mutiny Acts the military code became increasingly statutory. As regards crimes committed within the realm, a great constitutional conflict between the civil and military authorities ended in 1718 in a complete victory for the civil courts, and the position was thereafter regulated by the Mutiny Acts themselves. Neither conviction nor acquittal by a court-martial was any bar to proceedings in a civil court, which might choose to ignore entirely any sentences imposed by the military court; acquittal or conviction by a civil court, on the other hand, constituted a complete bar to any military trial, save only that a court-martial might cashier an officer upon a civil conviction. The extent of the jurisdiction of military courts over ordinary crimes was not defined, but it was virtually excluded in the case of murder and other grave crimes by the provision in the Mutiny Acts from 1749 onwards that within Great Britain and Ireland no person should be adjudged to suffer any punishment extending to life or limb except for such crimes as were expressly so punishable by the Acts themselves.²⁷

The position abroad continued to be regulated, not by the Mutiny Act, but by the Articles of War. These at first retained their medieval form, with separate articles for different crimes.²⁸

²⁴ For these Articles, see Gross, *Military Antiquities*, vol. 2. There seems to have been no special provision about murder, other than that of clerics. Apparently the medieval Tommy was more licentious than bloodthirsty.

²⁵ Gross, *op. cit.* (1788 ed.), p. 192.

²⁶ Gross, *op. cit.* (1788 ed.), p. 113.

²⁷ See Clode, *Military and Martial Law*, p. 53, *Military Forces*, i, p. 158. The Army Act has made inroads on this supremacy: all but five civil offences are now triable by court-martial (s. 41) and a civil court must take into consideration any sentence imposed by such a court (s. 162 (1)). On the other hand, a conviction by a civil court is now a *complete* bar (s. 162 (6)). See also the Courts-Martial (Appeals) Act, 1951, s. 16.

²⁸ See the Articles of William and Mary for their troops in Ireland (1689), and those of Anne for her forces in the Low Countries (1706): Articles 19, 20, 37 of both.

The Mutiny Act of 1712, however, conferred on the Crown a power to make Articles of War in time of peace as well as of war; the Articles were thereafter an annual affair, and there was a marked improvement in their drafting.²⁹ Between the years 1717 and 1748 the Articles annually provided that "... in our Garrison of Gibraltar, Island of Minorca, Forts of Placentia and Annapolis Royal, where Our Forces now are, or in any other Place beyond the Seas, to which any of Our Troops may hereafter be commanded; and where there is no Form of Our Civil Judicature in Force, the Governors or Commanders respectively are to appoint General Courts-Martial to be held, who are to punish Criminals by their Sentence, as has been practised heretofore, and authorised by former Articles of War."³⁰ For over a century one could trace, through the appearance and disappearance of place-names in this article, the success or failure of British arms and the establishment of colonial judicatures.³¹

With the end of the War of the Austrian Succession came a change in form. The Articles of 1749 contained, for the first time, a list of the offences to which the British soldier was deemed prone: "Wilful Murder, Theft, Robbery, Rapes, Coining or Clipping the Coin of Great Britain or of any Foreign Coin current in the Country or Garrison." Courts-martial were to try these and "all other Capital Crimes, or other Offences," and to punish offenders "with Death, or otherwise, as the Nature of their Crimes shall deserve."³²

From 1749 to 1840 this Article remained virtually unaltered.³³ Place-names changed and offences were added, but fundamentally it was the same Article which did service throughout that great period of armed expansion, when the principles on which the Army would exercise its jurisdiction over civil offences were worked out. The position in the colonies was clear: the presence of a civil judicature excluded military jurisdiction, while its absence left no alternative to a court-martial. Sometimes not even a court-martial was possible.³⁴ If the offence were committed on foreign territory, on the other hand, a court-martial was always competent

²⁹ It is unnecessary here to consider the way in which the prerogative power was gradually superseded by the statutory.

³⁰ Article 45 of 1725.

³¹ Gibraltar has survived even the Army Act: see s. 41.

³² Sect. XX, Article 2, of 1749.

³³ The Article for 1800 is set out in *R. v. Suddis*, 1 East, at p. 311.

³⁴ Thus lack of officers prevented trial of a murder in the Fort of Placentia in 1733. See the opinion of Willes, A.-G., cited Clode, *Military Forces*, i, p. 529. See also the opinion of the same Law Officer on the illegality of trying civilians by court-martial in Gibraltar, and the advisability of using 33 Hen. 8, c. 23, *op. cit.*, p. 533.

to try the case. Whether or not it would do so depended on the commanding general. In occupied enemy territory, the Army would always deal with the offender, but in an allied country he would generally be surrendered to the civil authorities. The Duke of Wellington adhered firmly to this rule; one can, however, sympathise with the reluctance of a British general in 1745 to hand over soldiers accused of clipping ducats in Ghent, where boiling in oil was the appropriate civil penalty.³⁵

From 1840 onwards, the changes in this article were mainly confined to alterations in drafting. Phrases which are reminiscent of section 41 of the Army Act begin to appear. The list of offences was reduced to a form which reflected a growing consciousness of the territoriality of the criminal law: "treason or any other civil offence which, if committed in England, would be punishable by a court of ordinary criminal jurisdiction."³⁶ Sentence of death, always discretionary, was restricted to offences which were capital when committed in England. Special provision was made for India: whereas in the Queen's other territories the presence of a civil judicature completely excluded military jurisdiction, in India it did so only within a radius of 120 miles.³⁷ By 1856 the articles dealing with civil offences had acquired the form which they retained to the passing of the last Mutiny Act in 1878.³⁸

In form section 41 of the Army Act is very different from the provisions of the Articles of 1878, but its purpose is the same. That purpose has always been, and still is, to ensure that the criminal law of England accompanies the Army wherever it goes and that there are courts to enforce that law. Under the Articles of War this purpose was effected by rigid provisions: the presence of civil courts excluded military jurisdiction. Under section 41 the jurisdiction of courts-martial is much wider, and depends very largely on a discretionary element. As a result the section applies within the United Kingdom as well as overseas, but this should not conceal its true function of extending the English criminal law to any part of the globe in which British troops are serving. The *whole* section has an extra-territorial character, which is emphasised by the fact that the section has no application to five very grave crimes unless

³⁵ See Lieut.-General Hawley's letter, cited Clode, *Military Forces*, i, p. 534. For Wellington's views, see his *Dispatches* (1852 ed.), iii, p. 350.

³⁶ Article 145 of 1878.

³⁷ This provision was originally evolved in the Mutiny (East Indies) Acts, which governed the troops of the East India Company between 1754 and 1857. After the Indian Mutiny, the provision was incorporated in the Mutiny Acts (Act of 1864, s. 105). It had already appeared in the Articles of War.

³⁸ Articles 130, 131 and 132 of 1856.

they are committed abroad.³⁹ In appealing to the Offences against the Person Act the court was seeking help from the extra-territorial element introduced into the ordinary criminal law by that Act. This was unnecessary: the element should have been found in section 41 itself. Insofar as Coke's reference—archaic even then—to the royal peace imported any sort of territorial limitation into his definition of murder, then that restriction could have no place in the military code. It should trouble a modern court-martial no more than it troubled the medieval Court of the Constable and Marshal.

The interpretation of section 41 should therefore have been the same, whether or not section 9 of the Offences against the Person Act had ever been passed. This is clearly seen when the other offences specifically mentioned in section 41 are considered. Five crimes were singled out: treason, murder, manslaughter, treason-felony and rape.⁴⁰ From the language in which all other offences are dealt with ("which when committed in England is punishable by the law of England") and from the fact that not only murder, but also treason and manslaughter have an extra-territorial operation in the ordinary criminal law, it might be thought that Parliament had had that in mind when it singled out these five crimes, and that it was therefore right to appeal to section 9 of the Offences against the Person Act. This is not so. The explanation for the choice of the five crimes is a peculiar one and could not be considered by the court.⁴¹ But the offence of rape puts the matter in its proper perspective. It is a coincidence that the crimes of treason and manslaughter have an extra-territorial character in the

³⁹ This provision is unfortunately omitted without indication in the reproduction of s. 41 in [1954] 1 Q.B. 170.

⁴⁰ The Treachery Act, 1940, s. 2, has added treachery to the list.

⁴¹ The proviso to s. 41 makes a clear distinction between the five offences and all others, but it is far from clear why a distinction is made in the body of the section. One can think of reasons why this or that offence should be distinguished (e.g., the absence of any discretion in the penalty for murder), but there is no one reason which will cover all five. There was virtually no alteration in s. 41 after it had first been presented to Parliament in the Army Discipline and Regulation Bill, 1878-9 (Parlt. Papers, 1878-9, i, p. 89). One has to go back to Sir Henry Thring's first attempt to merge the Mutiny Act and Articles of War. In his original Bill, there were to be only three civil offences: murder, manslaughter and rape. These were to be subject to the restrictions eventually contained in s. 41 of the Army Act. All other crimes were to be tried as conduct to the prejudice of good order and military discipline. This idea was then dropped, perhaps because of an unwillingness to extend even further this vague offence. Other crimes therefore became civil offences, but the original list remained and was added to. See the *Report of the Select Committee on the Mutiny and Marine Mutiny Acts* (Parlt. Papers, 1878, x, p. 253), Minutes of Evidence, p. 74, and Appendix, p. 146. The reference to "regulations" at the beginning of the section is also curious. They are non-existent. The word seems to be a mistake for "restrictions."

ordinary law like that of murder. The crime of rape has not. It is but an historical accident that Coke's definition of rape did not include a reference to the royal peace, yet it has never been suggested that it is not an offence against section 41 for a soldier to rape an Egyptian woman on Egyptian soil. Such a woman is not within the Queen's Peace: nevertheless, her case is covered by section 41, not because of any wording of Coke's, but because the Army carries the criminal law with it wherever it goes. So, too, Page's case is covered by section 41, not because of any provision in the Offences against the Person Act, but because of this fundamental principle of military law. It is a principle as ancient as the Laws of Cnut.⁴²

⁴² II Cnut, 61. See Pollock, 1 L.Q.R., p. 44.

BOOK REVIEWS

English Law and the Moral Law. The Hamlyn Lectures. Fourth Series. A. L. GOODHART, K.B.E., Q.C. [London : Stevens & Sons, Ltd. 1953. x and 151 pp. 12s. 6d.]

IN these four lectures Dr. Goodhart discusses the interaction between English law and the moral convictions of the English people, giving examples of their close relation in constitutional law, administrative law and international law (lecture II); criminal law, torts and contract (lecture III) and the other branches of the civil law (lecture IV). Without being unduly complacent about the merits of English law he points out that many existing rules which are subject to criticism concern cases where opinion about the correct moral solution is far from unanimous. And in some cases, such as the prohibition of duelling, English law has been in advance of the general moral convictions of the community.

In the Preface Dr. Goodhart confesses that when first preparing these lectures he was not at all happy concerning the relations between *sanction* and *law*—and your reviewer must confess that he is not entirely happy about the solution adopted in lecture I, “The Nature of Law and Morals.” In order to treat moral law, constitutional law, international law and civil law as species of the same genus (rather than as different uses of the same word) he defines law as a rule of conduct recognised to be obligatory. Thus he is able to omit sanctions from his definition of law. But it is submitted that more is lost than is gained by this device. Too many different types of rules, too vaguely defined, are unnecessarily caught in the same net. In support of his rejection of the “force” theory of law Dr. Goodhart relies on a quotation from Professor Axel Hagerström emphasising that there is a fundamental difference “between the fact that an action is commanded and its being a duty.” One may be in agreement with this and yet observe that there is also a fundamental difference between an arbitrarily enforced command and a *system* of rules equipped with sanctions by judges who recognise the *sources* of those rules (whether they be statute, precedent, custom and/or the general moral convictions of a people) as authoritative or obligatory. Definition of law in some such terms allows a distinction to be drawn between the law and the conventions of the constitution—between what the judges recognise an obligation to enforce and what they do not. This distinction, blurred by Dr. Goodhart’s definition, is important to a lawyer. Dr. Goodhart himself admits in his Preface, that the “recognition as obligatory,” which his definition of law requires, is sometimes only that of the judge. Indeed on page 27 he seems almost to accept the suggestion

here put forward. One cannot help thinking that Dr. Goodhart is unnecessarily trying to attain an Aristotelian definition, which must not only give the distinguishing marks, but also reveal the "essence," of the thing defined. There is, however, no contradiction in maintaining that "law" is most usefully defined in terms of sanctions, while protesting that its existence normally depends on the general recognition of a moral obligation to obey it. The greatest merit of this little book is its emphasis on the moral principles underlying the practice of the British Constitution. It is the recognition of these as obligatory, rather than "lawyer's law," which preserves the fundamental liberties of Englishmen.

B. E. KING.

Criminal Law : The General Part. By GLANVILLE WILLIAMS, LL.D.,
Quain Professor of Jurisprudence in the University of London;
of the Middle Temple, Barrister-at-Law. [London : Stevens
& Sons, Ltd. 1953. xlv and 719 and index 16 pp. 63s.] •

"THIS book is concerned to search out the general principles of the criminal law, that is to say those principles that apply to more than one crime." So Professor Glanville Williams describes the purpose of his new book on criminal law in the Preface, and it must be said at the outset of this review, that in so doing he has produced an important new major work which, so far as the "general part" of the criminal law is concerned, will take its place as a third major work alongside Archbold and Russell. It is a most valuable third work to be used alongside and in addition to the other two, not only for its full discussion in relation to the cases of principles common to more than one crime, but also for the essentially modern approach to principles, problems and authorities of the criminal law today—in particular the discussion of principles in relation to the large mass of statutory crime of varying gravity, and the effect of that large mass on existing principles. The whole approach of this new work is to recognise and discuss principles in the cases relating to common law and statutory crime, rather than to discuss principles in relation to common law crime, with statutory crime, despite its bulk, dismissed as an unfortunate appendage which is in a mess. It is to be hoped that this new work will result in a new approach, both legislative and judicial, to statutory crime and will bring thereby some greater order than the present inexcusable position. The materials for such a new approach have been made available by Professor Glanville Williams.

The scope of the work—*Criminal Law : the General Part*—has been widely interpreted. It covers a full discussion of the requirement of *mens rea* with important separate discussion of *mens rea* as affected by Ignorance of Fact and Ignorance of Law, chapters on the various defences and exceptions, separate chapters on Negligence, Strict Responsibility, Vicarious Responsibility, Corporations,

Principals and Accessories, Incitement, Conspiracy, and Attempt. In addition there are chapters on matters not found in the other works, such as the Principle of Legality, Preventive Justice and the Rule of Law, Consent Facilitation and Entrapment, and a valuable and practical concluding chapter on the Burden of Proof. Moreover the individual chapters range widely in content, *e.g.*, there are to be found treated in this work the particular mental elements required in particular crimes as the *mens rea* in murder; the *mens rea* in larceny; analysis of the cases concerning, and the meaning of, such words as "knowingly," "wilfully," "maliciously," when used in statutory crimes; the extent of claim of right as a general defence; the consideration of how far the supply of materials and information may make a person a party to a crime, and of interference with the course of justice and obstruction of the police in relation to parties to a crime. The chapter concerning Insanity deals with mental abnormality in the criminal law rather than being limited to insanity as a defence, and the one concerning Infancy is a monograph on Children and Young Persons in the criminal law. Matters of legislative policy, criticisms, suggestions for improvement and reform and the discussion of the law in "the setting of modern penological and psychiatric thought" are likewise included. The citation and discussion of Commonwealth reports and cases, especially in spheres where English authority is lacking, is a most welcome feature and may well result in the English courts paying much more attention to this valuable source of the common law, and greater reciprocity of influence of the decisions of different jurisdictions of the Commonwealth. United States reports and articles are also covered with similar beneficial effect. The full effect of this wide ranging treatment of the criminal law from the point of view of ease of finding the discussion of particular points cannot be judged until we have seen the second volume—the companion volume on specific crimes promised in the Preface—but it must require a more than usually efficient system of indexing and cross reference. In this respect in relation to the present volume this reviewer has not found the system of indexing and cross-referencing by paragraphs entirely satisfactory and would much prefer a system based on page references.

Of great interest is the author's approach to *actus reus* and *mens rea* and his analysis of the requirements necessary to supply the element of *mens rea* in common law and statutory crimes. He divides crimes into three groups. The first group comprises crimes requiring *mens rea* (including those requiring heightened or specialised forms of *mens rea*). The second group comprises crimes requiring negligence (*i.e.*, inadvertent negligence). The third group comprises crimes not requiring any kind of legal fault on the part of the accused, and is sub-divided into crimes requiring fault on the part of someone but not the accused (vicarious responsibility) and those not requiring fault on the part of anyone (strict responsibility,

absolute prohibition). With regard to the second group, *i.e.*, crimes requiring negligence, he states, "Outside the class of crimes requiring *mens rea* there are some that do not require any particular state of mind but do require negligence. Negligence is not necessarily a state of mind, and thus these crimes are best regarded as not requiring *mens rea*. However, negligence is a kind of legal fault, and in that respect they are akin to crimes requiring *mens rea*" (p. 29). He defines "*actus reus*" as the "whole situation forbidden by law with the exception of the mental element (but including so much of the mental element as is contained in the definition of an act" [*i.e.*, willed movement] or more shortly as the "'external situation' of any given crime." The proposition that there must generally be *mens rea* as to the *actus reus* means that there must generally be *mens rea* as to the external situation specified by the law for the crime in question. *Mens rea* is the mental element necessary for the particular crime and he regards the minimum requirement of *mens rea* to satisfy the general principle that a blameworthy condition of mind is required for crime as being intention or recklessness in relation to the complete *actus reus*, *i.e.*, in relation to *all* the constituent elements other than the mental element specified in the definition of the crime in question, or, expressing it in terms of foresight of consequence, intention or recklessness in relation to the *consequences* which in law amount to the *actus reus* of the crime. Some crimes by their definition require heightened or specialised forms of *mens rea*, *e.g.*, specific intents, particular kinds of knowledge or intention, but to satisfy the *mens rea* principle any crime must at least require intention or recklessness as above defined. His view follows that of Mr. J. W. C. Turner in relation to the requirement of foresight of consequence, but is a further analysis particularly as regards how far knowledge of every component of the *actus reus* is required (see the important chapter on *mens rea* as affected by ignorance of fact), and it adds also a half-way house in relation to fault or blameworthiness by the recognition of the group of crimes *outside the requirement of full mens rea* where negligence is sufficient. This analysis of *mens rea* as intention or recklessness is particularly valuable for statutory crimes, when the definition in the statute does not specify a mental element, for it is this intention or recklessness in relation to the constituent elements of the crime as specified in the definition in the statute which will be the mental element, the *mens rea*, when the statute is interpreted as requiring *mens rea*.

Although this is the modern requirement of *mens rea*—sometimes expressed, but more often latent in the judgments in the cases on statutory crimes—for the first time clearly presented and analysed, nevertheless it perhaps dismisses somewhat summarily older notions of *mens rea*, some elements of which still survive and may still affect the law in comparatively rare cases, *i.e.*, the imprecise notions of an element of moral blameworthiness or wicked

mind. It is clear of course that today moral blameworthiness is *not* a requisite of *mens rea* as a general rule, but there are rare cases where this notion still affects the law outside the defences of infancy and insanity. We may suggest, as examples, the fact recognised by Professor Glanville Williams (at p. 74) that exceptionally the court may be prepared to hold that a statute notwithstanding the omission of apt words was aimed at dishonesty or wickedness, e.g., *R. v. Matthews* [1950] 1 All E.R. 137; the interpretation of "maliciously" which some regard as not being *completely* explicable in terms of foresight, e.g., claim of right is a defence; the fact that in the case of a particular common law crime the law might be satisfied with something less than intention or recklessness in relation to the complete *actus reus*, e.g., intent to hurt in manslaughter; the *possibility* in certain types of statutory crime, particularly sexual crimes, that the court might accept an argument that in so far as the accused did intend the constituent elements of the *actus reus* he intended to commit a moral wrong and that this is sufficient *mens rea* for the *particular* crime irrespective of his knowledge of some *particular element* (the minority judgments in *R. v. Prince*), or at any rate because of the obvious nature of the moral wrong will be prepared to interpret the statute as imposing strict responsibility in relation to some particular element of the crime. These possibilities and slight qualifications, which may not be accepted by all, do not detract from the value of Professor Glanville Williams's analysis that intention or recklessness in relation to *actus reus* as above defined will as a *general rule* be the minimum requirement to satisfy the *mens rea* and particularly its value in relation to statutory crime and statutory interpretation, especially when coupled with his emphasis throughout that what is required is the mental element requisite for the particular crime or the particular circumstance of defence or excuse. The new book is also invaluable in its analysis through the cases of what is required for particular mental elements in given crimes—malice aforethought in murder, the requirements in manslaughter, where in both cases he differs from Mr. J. W. C. Turner's views in certain respects; the interpretation of "maliciously," "knowingly," "wilfully," "fraudulently," "intent to defraud," etc.; the discussion of the general principles of construction of penal statutes, with a strong plea for the requirement of *mens rea* save in exceptional cases, a suggestion to narrow strict responsibility to classes of public welfare offences already recognised, and a condemnation of the existing state of the law (pp. 270-1); the discussion and suggested limitations of vicarious responsibility with a similar condemnation of the existing state of the law. There is an interesting suggestion (at pp. 271 *et seq.*) that in relation to statutory crime "there is a half-way house between *mens rea* and strict responsibility which has not yet been properly utilised and that is responsibility for negligence." In all the above cases the book contains a detailed study of the

existing case law. This study and analysis of the cases in the body of the text is a characteristic of the whole work which should make it of great value to practitioners.

The following particular contributions must also be mentioned : Chapter 3 on Negligence and its place in criminal law, especially in its discussion of "gross negligence" in manslaughter; reasonableness of mistake, with the contention that "the idea that a mistake to be a defence must be reasonable, though lurking in some of the cases, is certainly not true as a general proposition" (pp. 163-74); the distinctions taken between mistake of fact and mistake of law, and the relative narrowing of the effect of "ignorance of the law is no excuse" (pp. 387-96); the discussion (pp. 396-433) of how far and in what crimes "claim of right" can be a defence, with its summary at pp. 432-3; the liability of Corporations (Chapter 22) which is the only full treatment of the law in its modern form in a general work; the concluding chapter on Burden of Proof with its practical jurisprudential analysis of the existing case law on "proof," "reasonable doubt," meaning of the term "defence," the exact scope of the supposed presumption or inference of intention arising from the statement that a man is taken to intend the natural consequences of his act (pp. 705-6, and also at pp. 77-81).

By way of suggestion for the next edition we would have liked to see a discussion of causation in criminal law. The reasons for the present order of the chapters were not clear to this reviewer. We have mentioned above indexing and cross-referencing by pages.

It is impossible in the space of a review to do full justice to this major work. Let it be said by way of conclusion that in the reviewer's opinion it is the most comprehensive theoretical and practical major work on the general part of the criminal law available in the common law countries, and an outstandingly valuable practical contribution to the understanding and administration of the existing law. To apply and adapt the words of Professor Sir Percy Winfield with reference to Holdsworth's *History of the English Law* the best tributes to this work will be not so much what reviewers say of it but what teachers and practitioners will do with it.

A. LL. ARMITAGE.

Governmental Liability. By H. STREET, LL.M., PH.D., Professor of Law in the University of Nottingham, Solicitor of the Supreme Court. [Cambridge: at the University Press. 1953. 223 pp. 25s. net.] This is the fourth publication in the series "Cambridge Studies in International and Comparative Law."

PROFESSOR Street is to be congratulated on his choice of subject for research in the year of his Commonwealth Fund Fellowship. The

law of Crown Proceedings in England and the Commonwealth, and the corresponding principles which apply under republican institutions, are a first-class subject for comparative study : for not only are most of the rules of modern origin, but they are also deeply permeated with doctrines of public policy which have grown to be of great importance. Professor Street concerns himself primarily with England, the U.S.A. and France, and he has not been daunted by the task of comparing three such different bodies of law side by side and on a fairly detailed plane. He has assembled much useful and interesting material, particularly when it is remembered that with its 186 pages of text this is by no means a lengthy essay on what is a very large subject.

Professor Street therefore makes the most of his space by proceeding from topic to topic (tort, contract, remedies, and so on) and comparing all three systems in each chapter. Many instructive comparisons may thus be made, though the broad picture of any one country's arrangements is necessarily sacrificed and the reader of this book cannot form any general impression of the ambit of the Crown Proceedings Act or of the Federal Tort Claims Act. The pith of the work is in the midst of the detailed discussion in each chapter, and the short passages devoted to general conclusions (for example on p. 55, where the heading has somehow got lost and the summing up is disguised under the title "Admiralty," and on pp. 185-6) tend to anticlimax. This is not intended as criticism, but rather as a warning that there is no easy path to the valuable ends which this book serves. The reader who will take the fairly arduous road (for it is not always made easy for him) of following the detailed argument will find many matters of great comparative interest by the wayside.

Some of the more striking points deserve to be mentioned briefly. The author draws attention to the American immunity for *ultra vires* acts purporting to be done under statutory authority, and English readers will surely agree with him that the comparison here is to England's advantage. The American rule is that there is no liability to "any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid." On the other hand there is virtually no comment on the American enactment, so extraordinary to English eyes, that there can be no liability to "any claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a Federal agency or an employee of the Government whether or not the discretion involved be abused." This *carte blanche* for the abuse of power, an exception which seems to shake the American Act to its foundations, has not unnaturally caused much trouble in the courts and some analysis of it would have been welcome. The American system emerges well, however,

when it comes to the question of non-disclosure of documents, which is the principal remaining bugbear in the English procedure for suing the Crown. In the type of case which has become such a scandal in England, where disclosure of documents is refused merely because they are in departmental files, American judges do not hesitate to examine the documents for themselves, and to order production even of whole files if they are not satisfied that the executive's claim to privilege is reasonable. And in criminal cases they have developed an interesting doctrine of waiver, under which the mere act of prosecution is held to imply willingness to disclose the evidence in the government's possession. From these and other passages the reader may find confirmation for the impression with which he will probably have started, that in the U.S.A. the judiciary are less deferential to the executive than in England, but coherent legislation is less easy to frame owing to the vicissitudes which attend its passage through Congress.

We are not told that they order these matters better in France. Professor Street lays bare the lack of any firm principles beneath the distinctions which govern the jurisdiction of the *Conseil d'Etat* in administrative cases: the limits of *faute personnelle*, *faute de service*, *acte de gouvernement*, etc., are illustrated by examples, but seem to be quite undefinable. If a French lawyer could claim no more precision for his system than is here allowed, it must indeed be defective and the *Tribunal des Conflits* must be kept busy. But, bearing in mind the author's treatment of the Crown Proceedings Act (discussed below), one may wonder whether he has done full justice to the fundamental rules of liability in France. It is strange that he gives no credit for, and indeed scarcely discusses in any comparative way, the outstanding development in France of an administrative machine which has developed from within itself a special court of law for its own control. In this way French institutions have bridged the gulf between "law" and "policy" which so severely limits judicial control of the executive in England and America, where the separation of powers still reigns. Professor Street nevertheless condemns the French system, with an emphatic mixture of metaphor, as "hamstrung by a blind unreasoning adherence" to the separation of powers. One respects his feeling, which is in the tradition of Dicey, that the ordinary courts are likely to prove the best judges in administrative as well as in other disputes. But if the French notion of executive independence does not produce ideal results, must it not still be balanced against the development of the *Conseil d'Etat* as an organ of administrative control? Untidiness of doctrine is a serious fault; but it may be remedied without any very revolutionary steps. The invention of a specialised jurisdiction for the control of all administrative activity, both on the legal and the political plane, is an achievement which Anglo-American law seems to be incapable of emulating by

any natural process of evolution. The author admits that this is a principle of great merit, but he is not an advocate of separate administrative courts. That, perhaps, is why his principal section on France may leave the reader with the feeling that great matters have been outweighed by small. For comparative purposes especially it is the French institutional structure which is of such great interest to English and American lawyers.

On the more detailed level which he prefers Professor Street brings out many intriguing points about the French system of remedies. A manufacturer of ice-cream substitute recovered compensation for loss of business when a statute prohibited the manufacture of this product, even though there were no provisions for compensation. Like so many other countries, including the United States, France pays damages for wrongful conviction. In tort the *Conseil d'Etat* has broken away from "fault" as the basis of liability, and is extending into various fields a concept of "risk," in other words of strict liability; thus a café proprietor sued successfully when works on the highway interfered with his business; and where a contaminated building was burnt down with all due care by order of the mayor, the owner of an adjoining house recovered compensation for incidental damage to his property. A man who was walking along a river bank was shot during what appears to have been an officially organised duck-shooting competition; he recovered both from the responsible official and from the State; but the justification for such a *cumul* is controversial. Some of this detailed discussion, which well shows the pains which the author has taken with his subject, would be clearer if he did not assume that the reader knew the meaning of technical terms such as *acte de gestion*, *mobile politique*, and *voie de fait*. He also seems to lose sight of France in his last two chapters: there is no mention of her in the chapter on "substantive limitations"; and in the important passage on non-disclosure of documents, perhaps the best part of the book, France is given less than two lines, which by no means make the French practice clear.

Professor Street courageously makes many suggestions for reform, even of the foreign systems. His views are always stimulating, occasionally ingenuous, and occasionally pontifical; it is not, after all, child's play to improve on legislative and judicial wisdom. The treatment of the Crown Proceedings Act tends to become a series of verbal skirmishes over points which might be footnotes to a comprehensive work on the subject, but which occupy too much of the space available here. A foreign reader could not acquire from these chapters any general knowledge of the English system. Most often the text which is being dissected is not quoted, and it is not always accurately summarised: the substance of sections 10 and 21 (2), for example, is given incorrectly; and it is a surprise to find that section 25 (4), which provides that execution shall not issue

against the Crown, is not mentioned in the passage on enforcement of judgments, but the rule enacted by the subsection is attributed to an article written by Professor Laski in 1919. It is alleged that the applicability in Crown proceedings of Acts such as the Fatal Accidents Acts depends entirely on the meaning of the word "express" (apparently meaning "expressly" in section 40 (2)); but how that subsection can possibly govern section 2 (1), or how it is possible to disregard the enactment that the Crown shall be liable as if it were a private person, is not explained. A curious statement on p. 141 that an injunction is not available at common law (*sic*) against an illegal act purporting to have statutory authority is not, one is relieved to find, supported by the case cited for it. In his desire to argue small technicalities the author sometimes skates rapidly over general principles, and this makes the reader suspect that the argument proceeds from shaky premises. On p. 126, for instance, it is said that if one person pays money which another owes, he may recover it by an action in quasi-contract; but, since there is no *negotiorum gestio* in English law, the statement is true only where the person who pays is compellable to pay. The reasoning here is elliptically stated and the reviewer has not succeeded in following it. Another partially accurate and partially inaccurate statement is that the special limitation period for actions against public authorities (now abolished) has been "extended to the Crown expressly by section 30 (2)," whereas it always did so extend and the subsection is merely a saving. It is strange, reverting to section 2, to find the author at a loss for the reason for section 2 (5), which very properly gives expression to the principle that judges, although servants of the Crown in name, are not so in reality; and his suggestion that all the ground is already covered by judicial immunity is surely incorrect in the case of many statutory judicial tribunals, for example courts-martial.

The reader will judge for himself, but it may be thought that in point of accuracy and clarity the author's text hardly justifies the tone in which he castigates the framers of the Crown Proceedings Act. The charges of "careless drafting," "drafting slips," and so forth, do not seem to be made out; nor does the verdict that a contention of the Treasury Solicitor is "hardly worth serious consideration." Many would agree with Professor Street that the Act bears too many marks of departmental influence, but it is another matter to impute negligence.

All students of State liability, whether English or foreign, can be recommended to consult this book, and they may be certain of finding useful material in it. It was a task well worth undertaking, and it may be hoped that it will be followed by more studies on even broader lines.

H. W. R. WADE.

Personal Property. By J. CROSSLEY VAINES, LL.M., of Gray's Inn and the Northern Circuit, Barrister-at-Law, Lecturer in Law in the University of Liverpool. [London : Butterworth & Co. (Publishers), Ltd. 1954. xliv and 292 and (Appendix) 58 and (index) 30 pp. 37s. 6d. net.]

THE appearance of an entirely new textbook on Personal Property is an event to which both teacher and student of this subject have looked forward for some considerable time. Indeed, in probably no other subject has the student been so neglected in the matter of adequate reading material and it was with pleasurable anticipation therefore that we read in the author's preface that "this book is an attempt to collect and expound in small compass the more important rules of law and equity which affect everyday transactions with personal property." As to what should be included in such a book there will always be two views, but we would give almost wholehearted support for Mr. Vaines's selection. Of the borderline subjects, Patents, Trade Marks, Copyright, Insurance and Company Law have been excluded, but Negotiable Instruments is included, and in the 292 pages of text the author presents his material under five headings: Part I, *The Nature of Personality*, consists of Chapters 1-3 and deals generally with definitions, distinctions and general introductory material. Part II, *Ownership and Possession*, contains four chapters: Chapter 4, Theory of Ownership and Possession; Chapter 5, Concurrent Interests; Chapter 6, Bailment; and Chapter 7, Liens. Part III, which is the main body of the book, is entitled *Transfer and Acquisition of Personal Property*, and consists of Chapters 8 to 17. These deal in turn with the rule "Nemo dat . . ."; Negotiable Instruments; Assignment of Choses in Action; Gift; Sale of Goods; Hire-Purchase; Finding; Occupancy and Limitation of Actions. Part IV, *Transfers of Personal Property by way of Security*, comprises Chapter 18, Mortgages; Chapter 19, Bills of Sale and Chapter 20, Pledge. Part V, *Debtors and Creditors* (Chapters 21-4), deals with the Insolvent Debtor, Bankruptcy, Execution and Distress. There is a 58-page Appendix containing the provisions of the Bills of Exchange Act, 1882, Sale of Goods Act, 1893, Hire-Purchase Act, 1938, and the Intestates' Estates Act, 1952.

The structure of the book is therefore such that it would appear eminently suited to the needs of the student for whom the author says he is primarily writing. The difficulties of the student in this subject are very real, for he is required to have a working knowledge of Contract, Tort and Real Property (including Trusts), though to assume that he has these principles at his fingertips without reminding him of them is to court disaster. Furthermore, in this subject he is faced, probably for the first time, with an exercise in integration which is both valuable and instructive, and if his interest is to

be maintained some golden thread must be kept running through these apparently unconnected topics. The main points of our criticism of this book, therefore, are that the student does not always receive the consideration, in the way of guidance and explanation, that he needs; that the material is at times presented in a way which lacks clarity; that the arrangement of material and the choice of illustration is at times unhappy and creative of inaccuracies; and that, occasionally, matters on which there are clearly two opinions are stated dogmatically in one sense only.

Under the first head, that there is often lacking sufficient explanation of what are well known to be student difficulties, perhaps the most striking example occurs on p. 179. Here one would expect some explanation of the rule that an assignee takes subject to equities. There is in fact no more than the bare statement that, "The assignment is subject to existing equities," followed by the facts of *Roxburghe v. Cox*. Again at p. 200 the student is entitled to some explanation *why* a debt is released by the creditor appointing the debtor his executor. All he is given is this: "*Re Eiser's Will Trusts*. Debts arising out of guarantees by a testatrix of her son's loan and current accounts at a bank were not released by the testatrix appointing her son executor because on each occasion the overdrafts were guaranteed, the son charged his interest in a public house to secure the amounts the testatrix might be called upon to pay." Again, section 11 (1) (c), Sale of Goods Act, 1893, contains some horrors not to be solved merely by setting out the terms of that section (p. 215) without any guidance. And throughout the book there appear footnotes such as, "See the Textbooks on Commercial Law" (p. 212), "See the Textbooks on History of English Law, and Real Property" (p. 14), "See the Textbooks on Real Property and Conveyancing for a full discussion of the topic. Refer also to the law of partnership" (p. 49), which are not the helpful signposts which a student is entitled to expect.

Secondly, material is sometimes presented in such a way that clarity and intelligibility are often missing. Thus at p. 25, under a subheading "Chattels Real," there appears this sentence: "Chattels real which, says Lord Coke, in another unhelpful definition, are such as concern or savour of the realty, include, for modern purposes, only leaseholds and estates by the writ of *elegit* founded on the Statute of Westminster, 13 Edw. 1, c. 18, and under which the sheriff delivered to the judgment creditor one half (later the whole) of the land of the judgment debtor until the debt be levied." The note to this sentence refers the reader to "*Annual Practice*, notes to Order xliii, r. 1"! The attempt, at p. 130, to paraphrase the provisions of the Disposal of Uncollected Goods Act, 1952, reads: "With what might seem unnecessary detail and in laboured terms the Act provides that bailees of goods accepted in the course of business for repairs and [*sic*] other treatment may sell the goods if the bailor fails to make the charges and take or give

directions as to redelivery, subject to certain conditions including the following :—” On p. 207 the author says that the passing of the property in goods is of paramount importance in two respects . . . “Secondly, the rights of purchasers from the buyer, trustees in bankruptcy and other third parties may stand or fall upon the fact of the passing of the property to the buyer.” On pp. 127–8, the two statements, “A person may become a factor, *pro hac vice*,” and “But to entrust an article to an individual for sale does not, without anything more, make him a factor,” require much fuller explanation. And the “well-known [*sic*] case,” *cf. Taylor d. Atkyns v. Horde (1757) 1 Burr. 60* does not seem the happiest illustration of the text on p. 35.

Our third head of criticism relates to the arrangement of material. Is there really any good reason for dealing with loss of lien (p. 107) before the student is told about General and Particular Liens and the nature of both (p. 108)? And could not the Inn-keeper’s Lien be brought in to the Chapter on Lien from the preceding Chapter on Bailment? Again, it is thought that in the Chapter on Gift (Chapter 11), the treatment (under the heading of General Essentials) of such topics as revocation, gifts upon condition, undue influence and mistake, ought logically to come after the student has some idea of the requisites of a valid gift. No book on the law of contract deals with mistake before it deals with offer and acceptance : why try and set aside a gift before one has been made? And when dealing with current coin as the first exception to *Nemo dat*, is the student helped on that topic by a page-and-a-half of footnote on the Diplock litigation (pp. 116–7). The same criticism would apply to the eleven pages (pp. 13–24) on Succession, which includes the text of the Intestates’ Estates Act, 1952 (even though it is also reproduced in the Appendix), and sub-headings like Adoption, Legitimacy, Crime of Beneficiary and Matrimonial Home. Almost four-and-a-half pages are devoted to a detailed treatment of *United States of America v. Dollfus Mieg*, etc.; and this might have been excusable had the author not ended by saying (p. 48) : “It will be seen, therefore, that the case does not add anything to English municipal law except some rather confusing dicta.” If that is really so, ought it not to have been relegated to a footnote?

There are also some matters upon which the views of the author cannot be allowed to pass without question. On p. 27, for example, he says : “a watch, objectively, is a chose in possession, but if it has been pledged with a pawnbroker the better view seems to be that the owner’s right respecting the watch is a *chose in action* . . .” But surely a pledgor in such a case does not have to go through the machinery of section 136, Law of Property Act, 1925, if he wishes to dispose of the watch! Again on p. 29 and p. 180 the author says that assignments of *equitable* choses can never come within section 136 : but this ignores altogether the words of the section

which allow notice to be given to a *trustee* : and a view contrary to that of the author may be seen in Marshall, *Assignment of Choses in Action*, pp. 162-8. In Chapter 20, Pledge, the author having restricted himself to three pages on this subject, says (p. 259) that delivery in a pledge may be effected by the handing over of a delivery order: Lord Wright, however, took a different view in *Official Assignee of Madras v. Mercantile Bank of India* [1935] A.C. 53, 58-60. And when personal representatives sell the deceased's property, is this really an example of an exception to *Nemo dat* (p. 130)? And to put *Commonwealth Trust v. Akotey* in the text, and *Mercantile Bank of India, Ltd. v. Central Bank of India, Ltd.* in a footnote on p. 118 is really indefensible in the light of what was said about *Akotey's* case in the latter case.

There are also occasions when the manner of presentation is irritating, presumably because it is unconventional. At any rate, it is thought that the following, which are samples, could have been better expressed. On p. 234 the Chapter on Finding opens thus: "The finder of chattels acquires a good title as against all but the true owner. The leading authority for this proposition is *Armory v. Delamirie* (1722) and so famous and charming a case deserves to be quoted in full as it appears in 1 Stra. 505." On p. 183 there appears "*Rule in Dearle v. Hall*.—As stated in the headnote to the report in 3 Russell . . ." The citation of cases *in the text* is often anything but elegant. Thus, on p. 126 after the facts of *Du Jardin v. Beadman Bros., Ltd.*, we read, "*Folkes v. King* [1923] 1 K.B. 282, *Pearson v. Rose and Young* [1950] 2 All E.R. 1027; [1951] 1 K.B. 275 applied; *Oppenheimer v. Fraser and Wyatt* [1907] 2 K.B. 50 not followed." The same kind of thing appears on p. 104; and on p. 87, after the facts of *White v. Steadman*, one reads, "*Held* (headnote in L.R.) . . ." and on p. 70, "*Held* (All E.R. headnote)." A variation on this theme occurs on p. 69 where the account of *Burton v. Levey* ends up with, "He actually based his judgment on *fraud* in the infant and equitable restitution (see *Stocks v. Wilson*). An unsatisfactory case."

Among the omissions, we find it hard to understand why *Gallagher v. Shilcock* [1949] 2 K.B. 275 finds no place at p. 214; why there is no treatment of section 7, Sale of Goods Act, 1893, and on this point no mention of the Law Reform (Frustrated Contracts) Act; why *Re Rose* [1952] Ch. 499 is not even mentioned, though its 1949 namesake is; and why *Hislop v. Hislop* (1950) is not mentioned on p. 256 with *Ramsay v. Margrett*.

What is also regrettable is the considerable number of misprints and slips many of which are really inexcusable. For example, "Chair of Commercial Law" in the Preface; "Debtors and Creditors" in capitals in the Contents. The reader will also find such new legal dignitaries as Aitken L.J. (p. 53), Delvin J. (p. 85) and Baron Parde (p. 66). On p. 231 there is "charge or circumstance" (for incumbrance); on p. 196 a new Statute, the

Deeds of Assignment Act, 1914; on p. 114, "purchases of goods bound by a writ is execution"; on pp. 65-6, "It is another aspect of the *Armory v. Delamirie*" (What?); and on p. 53 *Jones v. Maynard* should presumably read *Re Cohen*; on p. 10 three differences between real and personal property are mentioned, but a fourth (then dealt with in the text, *viz.*, restrictive covenants) is omitted.

It would indeed have been pleasant to be able to say that in Mr. Vaines's book the student now has a book on personal property which will serve him better than any existing one. Perhaps we expected too much, but it is a matter for regret and disappointment that the student will still have to be recommended to seek elsewhere for additional material on many of these topics.

T. C. THOMAS.

American Law of Property: A Treatise on the Law of Property in the United States, in seven volumes. Editor-in-chief: A. JAMES CASNER. [Boston: Little, Brown and Company. 1952. \$115.]

IN this celebrated treatise, twenty-five distinguished authors, many of them professors in American universities and each with special experience in the topic or topics of which he writes, present the Law of Property as it stood in the United States at the end of 1951. The project, as explained in the Preface, was designed primarily for practising lawyers: a unified treatise, not a mere series of monographs, "analytical in approach and practical in impact." Its chief concern is to deal comprehensively with the land law excluding intestate succession and wills; but many aspects of the excluded topics and even of personal property are considered under other headings—*e.g.*, *s.t.*, Construction, Class Gifts, and Future Interests. The six volumes of exposition (totalling some 4,800 pages) comprise twenty-seven Parts, each usually the work of a single author; a final Part (Rights incident to Possession of Land) is to follow; and pocket-supplements will be issued from time to time. The Index Volume (Vol. VII—1,018 pp.) tables some 38,000 cases; the statutes of the various jurisdictions—those from England comprise 48 prior to 1800 and 46 thereafter and range from the Statute of Merton to the Validity of War-time Leases Act, 1944; and a comprehensive subject-index. The historical background of the subject as a whole, from Feudal England to the Restatement, is summarised by Professor Simes in Part I (70 pp.); and, in general, each Part has its own historical introduction outlining for its particular topic the common law and the extent of its acceptance and statutory modification in the various states.

To an English property-lawyer, there is much here which is or was or ought to be familiar—*e.g.*, in the treatment (Parts 2-6) of

Freehold Estates, Landlord and Tenant, Future Interests, Estates arising from the Marriage Relationship, Concurrent Estates, and (Parts 8, 9) of Easements and Licences, and Covenants. But there are several major topics, such as (Parts 7, 10) Community Property, and Oil and Gas Rights (330 pp.), which remind one that a variety of legislatures and jurisdictions is not the only special feature of American life. And even in those topics in which one expects to feel at home there are many surprises: neither the prominence of our trust for sale nor any analogy to our Settled Land Act innovations is discernible; the entail has virtually disappeared and become a fee simple or a life estate with remainder in fee; the perpetually renewable leasehold survives; such rent restriction tenancies as have existed can be terminated when the lessee dies; there are "co-operative apartment housing schemes," having tax advantages, in which each lessee holds shares in the lessor-corporation; the "worthier title doctrine" still exists in most places; *Shelley's Rule* survives in some states and perhaps in others. Dower has been extended but is on the wane; curtesy is abolished in half the states but remains, as a protected expectancy, in others; and, for over a hundred years, there have been statutory "homestead laws" (exempting the home from liabilities for debt and restricting its alienation) far wider than our new Intestacy Act, 1952. There is usually a presumption of tenancy in common rather than joint tenancy (where that remains); primogeniture has gone and with it "coparceny"—for heirs now inherit in common; there is a proposal for the abolition of tenancy by entireties, which still flourishes in half the jurisdictions. Easements in gross appear to be fully accepted: they seem to include those of our licences (not coupled with an interest) which are not revocable at will: from this it is argued, against authority, that the burden of a covenant in gross should be able to run with the fee. There is near unanimity that the burden of positive covenants runs as readily as that of negative covenants. Ordinarily a deed of conveyance requires no sealing; but its "delivery" (as to which there is much law and some uncertainty) is everywhere essential, and (contrast our disclaimer) it is invalid until the grantee accepts it expressly or by implication. There are problems about civil death and about the seven-years absentee who returns after a court of probate has held him to be dead and has authorised the sale of his property. And one notes with interest the variety of periods of limitation, ranging from four to thirty years, which have replaced the statute of James I.

Pure conveyancing is represented primarily (Parts 11, 12, 16-18) by the topics Vendor and Purchaser; Deeds; Mortgages; Priorities, Recording, Registration; and Examination of Title. Here the striking feature has been the universal adoption of Recording Acts whereby, when the grantor has acknowledged the deed, the whole of it is officially recorded. Unless the Recording Act is merely permissive, deeds not recorded in due time are void or temporarily

inoperative. Under some statutes, deriving from the Statute of Enrolments, such recording is the sole test of priority; under others, derived from the Middlesex Registry Act, a subsequent purchaser with notice (at the time of his grant or of the recording of it) does not prevail over an earlier unrecorded conveyance. Since these Acts embrace practically all instruments which convey or encumber the legal or equitable title, there is little room for the old equitable doctrines of priority; and, since the deeds when they have been recorded are no longer of primary importance, the equitable mortgage by deposit of title deeds is almost unknown—and in any case is thought to be caught by the Statute of Frauds. In fifteen states, moreover, there is now a voluntary system of Registration of Title, fettered by the constitutional limitation that every original registration must be done by a judicial proceeding lest third party rights be barred without due process of law. Thus the examination of title nowadays is largely a matter of searching records and registers and scrutinising certificates of title. The current form of legal mortgage, it appears, is still the old conveyance in fee with proviso for redemption; but various statutes have deprived the mortgagee of many of the incidents of his legal title, and in some states (the so-called “lien states”) he is deprived even of his common law right to take possession, so that his remedies are reduced to foreclosure or sale and he is regarded (in spite of the conveyance to him in fee) as having a mere charge or lien.

There are other topics which, in a sense, deal primarily with conveyancing, *e.g.*, Fixtures, Construction Problems, Class Gifts, Powers of Appointment, and the Rule against Perpetuities (Parts 19, 21–5). Here the divergences from our law would appear to be comparatively slight. One doubts, for instance, whether the American law of Fixtures is so different from ours as § 19. 2–3 supposes. The first limb of the *Rule in Wild's Case* finds itself (as in this country) in a difficulty, for entails have gone: its second limb remains. The rules as to the closing of a class are similar to our own, save that the matter remains complicated by the destructibility of legal contingent remainders. The Rule against Perpetuities (as at common law) is introduced by Professor Leach and his colleague with heavy criticism of the methods and terminology employed for that topic in the *Restatement*—which is also criticised elsewhere in the treatise. They proceed to expound it with exceptional clarity and skill and to recommend certain legislative modifications—*e.g.*, a *cy-près* doctrine which will enable the courts, when faced with a perpetuity, to recast the limitation so as to achieve as nearly as possible the testator's evident intentions (meanwhile “the legal profession makes the mistakes and the families of its clients pay the penalty”). Some statutory changes in American jurisdictions are regarded as steps in the right direction: a “wait and see” rule in one state; a decision in another that excessive ages be read as twenty-one. But it appears that much of the state legisla-

which attempted to modify the rule made matters worse—five of these legislating states have already returned to the common law. Thus, as at July 1, 1951, the common law rule survived unaltered in all but fourteen states, and even in those fourteen the majority have preserved its main principles.

It is hoped that those who are well acquainted with the American legal scene, and in particular the learned authors of this impressive work, will make allowance for such inaccuracies as a harassed reviewer (faced with seven bulky volumes) has committed in his attempt to proclaim its scope and thoroughness and importance. He has found in it much fascinating and enlightening material: new problems, new angles on known problems, suggestions for reform, and much besides. To the academic lawyer this material is a valuable source of comparative law and comparative legal history. To practising lawyers and those concerned with law reform it is a source of persuasive authority for the development of the common law and a record of numerous legislative experiments for its modification. Moreover, its learned authors did more than expound their law: they were free, out of their long experience, to criticise it and offer suggestions for improving it. That, too, operates to our advantage.

S. J. BAILEY.

Jurisprudence in Action: Legal Essays selected by the Association of the Bar of the City of New York Committee on Post Admission Legal Education. [London: Sweet & Maxwell, Ltd. 1953. pp. xii and 494. £2 5s.]

THIS collection of essays and addresses is aptly described on the title page as a "Pleader's Anthology." But it is no mere case book of "readings." Each essay or address is given in full, and the philosophy of law, the judicial process, specific legal techniques and legal history receive a balanced representation. The literature of the law is rich enough to produce several such anthologies of similar merit, so that none of the selection committee was wholly satisfied with the final result. This is hardly surprising: their task was like that of a large committee selecting a cricket team to play against Mars.

Thus it is a fact rather than a criticism that no room has been found for Winfield or Lord Wright. But Lord Macmillan is here with his "Ethics of Advocacy," Pollock with his "Judicial Caution and Valour," Maitland with his "Prologue to a History of English Law," and Holdsworth with his "Holt and Mansfield." Holmes is represented, almost inevitably, by "The Path of the Law," and Ames by his "Law and Morals"; Cardozo by his "Law and Literature" and a review of his "Nature of the Judicial Process" by Learned Hand. Max Radin, Morris R. Cohen and Roscoe Pound

are represented by typical essays; Charles B. Curtis contributes "A Better Theory of Legal Interpretation" which makes an admirable case for the theses he sums up in his final sentences—"What we admire in legal draftsmanship is not precision. It is a precisely appropriate degree of imprecision."

Perhaps the weakest choice is Vinogradoff's obituary sketch of Maitland's work, which may confuse the general reader with its allusions to scholarly controversies. But the pleader who browses in this anthology cannot fail to gain stimulus—remembering old favourites and being introduced to new ones—and to have the appetite whetted for more. Brief biographies of the contributors are a useful feature. But it is to be regretted that these do not give references to the place of original publication of the essays they introduce.

B. E. KING.

Conduct and Etiquette at the Bar. By W. W. BOULTON, B.A., of the Inner Temple, Barrister-at-Law, Secretary to the General Council of the Bar. [London: Butterworth & Co. (Publishers), Ltd. 1953. vi and 71 and (index) 13 pp. 8s. 6d. net.]

Legal Ethics. By HENRY S. DRINKER, Member of the Philadelphia Bar, Chairman of the Standing Committee on Professional Ethics and Grievances of the American Bar Association. [New York: Columbia University Press. 1953. xxii and 436 and (index) 12 pp. 32s. net.]

Mr. Boulton's little book is in the main a collection, conveniently arranged under a few broad headings, of the numerous decisions of the Bar Council on questions of professional etiquette. As one would expect, the work has been prepared with the utmost care, and it can be thoroughly recommended to all practising members of the Bar as a useful and reliable book of reference and to the newly called for careful study as part of their practical training. In the nature of things, however, the decisions of the Bar Council do not form a complete code on the subject, and, quite rightly, Mr. Boulton has, as he states in his preface, "supplemented" them "where necessary by authorities from other sources." If there is any criticism to be made of the book, it is perhaps that Mr. Boulton could usefully have drawn more extensively from other sources, in particular from the common law and from the unwritten conventions of the Bar. Thus, under the title "Courts and Tribunals," a good deal more could be said as to the duty of counsel to the court. A subject which is hardly touched upon is the duty of secrecy regarding information confided to counsel, and the duty of counsel not to make use of such information for his private advantage. Another matter—relations with other members of the

Bar—might well receive fuller treatment under a separate heading.

Mr. Drinker's *Legal Ethics* is a much more ambitious work, financed by the William Nelson Cromwell Foundation, whose objects include the "cultivation of the highest standards of ethics, honor and conduct in the practice of Law." It is interesting to note that legal professional ethics has received much more attention in the United States than in this country; for not only has it been the subject of several major treatises and of lectures at the Law Schools, but Codes of Ethics have been formulated and adopted by the American and State Bar Associations. It is astonishing to note that the American Bar Association have also formulated Canons of Judicial Ethics, as a reminder that "the character and conduct of a judge should never be objects of indifference" and "as a proper guide . . . for judges, and as indicating what the people have a right to expect of them." Mr. Drinker's treatise makes fascinating reading, and, although intended for the use of American lawyers and law students, it contains much that should be equally stimulating and edifying to practitioners of both branches of the profession in this country.

H. E. FRANCIS.

Lie Detection and Criminal Investigation. By FRED E. INBAU and JOHN E. REID. 3rd ed. [London: Baillière, Tindall & Cox. 1953. xi and 242 pp. 38s. 6d.]

THE authors formerly worked together as members (the first-named as Director) of the Chicago Police Scientific Crime Detection Laboratory. Since then, the first and principal author has become Professor of Law at the Northwestern University, while Mr. Reid is Director of a private organisation specialising in the use of lie-detection techniques. Part I gives the best account yet published of the mode of using the "lie detector," a scientific gadget which may come to play an important part in the work of a lawyer. Essentially it is an instrument for recording changes in breathing and blood pressure, a suppression of respiration and increase of blood pressure, when answering an examiner's question, being taken as indicating that the answer is a lie. In addition, modern polygraphs record the pulse and the G.S.R. (psychogalvanic skin reflex), to which Mr. Reid has added a record of certain muscular activity. All these are indicated on a moving strip of paper which can be examined and interpreted at leisure.

A valuable account is given of Mr. Reid's practice in using the polygraph, from which it becomes evident that, quite apart from the obtaining of a mechanical record, an important purpose of the examiner is to extract a confession of the truth. By impressing the suspect with the "infallibility" of the lie detector, he may obtain

a confession even before it is switched on (p. 113). In some circumstances, where the record is inconclusive, bluff is employed—the examiner, without disclosing the inconclusive nature of the record, interrogates the suspect on the assumption that he is guilty (p. 79). Thus the use of the polygraph is not a mere matter of mechanics; it involves what may be called a psychological attack upon the subject. It is true that, according to the authors, the successful outcome of the procedure does not require that the suspect should answer the questions addressed to him, the polygraph recording not being materially different if verbal answers are dispensed with (p. 140). But questions there must be; and to avoid a large proportion of inconclusive results these questions must be carefully framed and administered in the way most likely to stimulate a confession. This characteristic of lie-detector technique is in itself an obstacle to its employment in English criminal cases, governed as they are (or are supposed to be) by the Judges' Rules. Even in America, where police interrogation and even the third degree are tolerated, evidence of lie-detector results is excluded, on the ground that there is not as yet any general consensus of scientific opinion in support of them. With commendable objectivity and restraint the authors support this judicial attitude, for the reason, chiefly, that even in America (where the use of the polygraph has been much more extensive than in England) there are no standardised instruments or procedure or examiner's qualifications. It may be expected that in time these deficiencies will be overcome. Even at the moment, Mr. Reid claims remarkably successful results in his own practice (p. 111). These claims are a little difficult to reconcile with the admission made at p. 129 that in the average case the same polygraph record can be made the subject of divergent interpretations, the two interpretations having "perhaps equal effectiveness." This sentence may be an error in expression; if not, it contradicts the rest of the discussion.

As a beginning, the most promising field for the use of the lie detector is by consent in civil cases, *e.g.*, in paternity issues where the blood-group test indicates only that the man in question *may* be the father. In civil cases, determined upon the balance of probability, there can be no rational objection to the use of a device which, putting it at its lowest, is better than making conjectures. In criminal cases, questions may be raised as to the admissibility of confessions obtained on lie-detector examination. In America such confessions are allowed in evidence, but in England they may be excluded at discretion under the Judges' Rules. It may be pointed out that these Rules did not specifically consider the use of lie-detection instruments, which raise entirely new problems. There is, at any rate, far less reason for distrusting a confession made during or after the suave lie-detection interview than after the kind of bullying police interrogation which is permitted in some countries. However these questions are

answered, it seems inevitable that the polygraph will, in time, present a challenge to accepted methods of legal proof. That English judges are not impervious to new scientific evidence is shown by the admission of EEG recordings since the war; but these are admissible only when the insanity issue, which is regarded as a defence, is raised by the accused. It is a different and more serious matter to allow a method of proof which, if accepted, completely upsets the traditional method of bringing home a charge of crime.

The second part of the book deals with ordinary criminal interrogation, whether of a suspect or of witnesses, and with the law governing confessions. The assumption on which the discussion rests is that a suspect is being interrogated in the police or State Attorney's office for the purpose of securing a confession, and it is further assumed that a certain amount of trickery or falsity is permissible. Thus, the interrogator is advised to wear civilian clothes, and to make expressions of friendship for, and on occasion to flatter, the suspect. He may sympathise with the offender by telling him that anyone else in similar circumstances would have done the same, and he may reduce the offender's guilt feeling by minimising the moral seriousness of the offence, condemning the victim or the accomplice, or putting into the offender's mouth defences which the interrogator knows will not eventually be of any avail in court. The interrogator may pretend confidence in the guilt of the suspect which he does not feel; he may falsely tell the suspect that an accomplice has confessed; and he may indulge in "play-acting" with a fellow officer, one pretending to be friendly to the accused while the other is unfriendly. The authors defend the apparently "unethical" character of some of these suggestions by saying that it is better that a serious criminal be convicted by these means than that he should remain at large to commit similar crimes. An aspect not discussed is the effect of such practices on the police themselves and on the confidence placed in them by the public.

GLANVILLE WILLIAMS.

Cases in Constitutional Law. By SIR D. L. KEIR and PROFESSOR F. H. LAWSON. [Oxford: at the Clarendon Press. Fourth Edition, Revised. 1954. xxxvi and 544 pp. 35s. net.]

"KEIR and Lawson" has earned a large debt of gratitude from the generations of law students whom, since its first appearance in 1928, it has guided so agreeably through certain topics of constitutional law. It is much more than a case-book, and it owes its reputation principally to the admirable introductory sections in which the law surrounding each group of cases is discussed. These are, as the authors say, a series of short essays on special topics.

But so judicious is the selection and so helpful is the commentary that a student who masters these short sections may feel that he has been well introduced to almost all the issues on which legal argument of a general kind is profitable for him. These are the oases of the subject, between which in comprehensive textbooks there lie more arid stretches of description, of great importance to the student of structure, but less sharpening to the wits of those who seek not only to learn but to understand. This treatment is a good compromise between the technique of Dicey, who selected by leaving a great deal of the subject out, and that of the scrupulously comprehensive textbook, dominant today, which has to pass over in a few lines some fundamental issue which, once discerned, provides a fine subject for argument and does much to leaven the lump. It is the great merit of Keir and Lawson that it directs attention to these issues, and provides enough discussion to show their importance. No one who has used the book needs to be told that its style is attractive, and that the authors are singularly skilful in anticipating the questions which naturally arise in the reader's mind as he peruses each introductory section. The authors could wish for no higher praise than this, that their own contributions by no means suffer in comparison with the judgments which follow them. Any criticism (for the reviewer has not been fortunate enough to find himself in the right camp on all matters of opinion) must be understood to be subject to these overriding tributes.

Since this is the first fully revised edition since 1933 (the edition of 1948 was only a stop-gap) there are, of course, important changes. Overshadowing all else is the fact that the chapter on administrative law, called "Judicial Control of Public Authorities," has greatly expanded, and has become almost a cuckoo in the nest. This chapter has monopolised all the new cases, with a single exception, and in order to make room for it twenty cases and two statutes have been cast out. How much longer, one may wonder, will it be possible to treat administrative law as a mere department of constitutional law, and not as independent territory.

As it is, a review of the present edition has two distinctly different functions: first, to consider the chapters which still bear strong resemblances to their predecessors; and secondly, to assess the new chapter on Judicial Control. Before this, however, one new and admirable feature of the book may be noted: a table of judges, complete with dates, is given after the table of statutes.

The opening chapter on legislation is difficult to illustrate by suitable cases, and the two which now stand first (*Bilston Corporation v. Wolverhampton Corporation* and *Tamlin v. Hannaford*) make no concessions to the beginner. Clarity has been gained by separating the sections dealing with sovereign and subordinate legislation, and in the former section *Ellen Street Estates, Ltd. v. Minister of Health, Att.-Gen. for New South Wales v. Trethowan*

and the *Harris* case from South Africa are duly noticed. But the reader is not told that he will find an account of the facts of the *Trethowan* case in the last chapter of the book, or that, being itself an example of subordinate legislation, it is a most instructive counterpart to the other cases. For, like the *Harris* case, it is one of the rare examples which really help in the analysis of sovereignty, and opportunities for such lessons ought not to be missed. But, at least in one reader's humble opinion, the introduction is open to the graver charge of giving no clear idea of what legal sovereignty means. We are told, for instance, that when Acts are passed under the Parliament Acts, 1911 and 1949, "the sovereign body amounts to no more than the Crown and the Commons. And were a referendum to be introduced, the electorate might become for certain purposes an additional House of Parliament." These statements assume that Parliament is able to bind itself as to the form of subsequent legislation, which the Court of Appeal has denied; and that a legislative body can be sovereign for some purposes but not for others, which is a contradiction in terms. Any student who has grasped the meaning of sovereignty, and who observes sections 2 (1) and 4 (1) of the Parliament Act, 1911, is bound to conclude that Acts made by Crown and Commons alone are Acts of subordinate, not sovereign, legislation: for there are legal limits to their competence, and they owe their authority to a higher power. If the contrary is to be argued, either the limits imposed by the Parliament Acts are worthless, which would be surprising; or else one must predict that the English courts, like the South African courts, would be ready to hold that entrenchment was possible and that, accordingly, Acts on certain matters (such as prolonging the life of Parliament) could be made proof against repeal by a body declared to be sovereign. All probability is against such assumptions, and the authors themselves appear to shrink from pressing the South African analogy. Yet it is said (p. 7) that a "skilful draftsman" could entrench an Act of the United Kingdom Parliament by the "simple device" of "providing that no Bill purporting to repeal it should have effect unless approved by referendum." In other words, it is said that the result would be exactly the same as in the *Trethowan* case, as if the Colonial Laws Validity Act made no difference at all. Of course, the decision of a court on the validity of a purported Act of Parliament may be, as the *Harris* case was, a fundamentally novel and therefore unpredictable decision, attributable to some revolutionary change, such as the achievement of political independence. But the suggestion that any Act can be made proof against repeal by Crown, Lords and Commons is itself so revolutionary that it should not be put forward to students as a self-evident truth. The reviewer will probably not be alone in feeling that the "skilful draftsman's" "simple device" looks more like a simple draftsman's aberration; and that the veiled phrases in which the

Trethowan and *Harris* cases are alluded to, hardly to be understood by anyone not familiar with them in advance, give little guidance to the deeply interesting questions which those cases present.

The chapter on Prerogative has always been an ornament of the book, and it has been further improved by rearrangement of some of the extracts. Nowhere else is it possible to find so good and yet so concise an account of the great legal battles of the seventeenth century. The student is given enough material to grasp the issues for himself, and to appreciate the interplay of law and politics at a time when law was called upon to decide questions which only politics, and other battlefields, could settle. To the modern lawyer, as the authors say, cases such as *Darnel's* and *Hampden's* "wear an exotic look"; but, brought to life as they are in these pages, they are indispensable to an understanding of executive power, and to an appreciation of the few but important constitutional changes which became the pillars of the rule of law. The collaboration of historian and lawyer here brings forth its best fruit. The section on Act of State now forms the second part of this chapter. The doctrine is discussed most helpfully, particularly in relation to treaties. The authors do not evade the difficult question of reconciling the conventional doctrine that Act of State cannot be pleaded against a British subject with the case of *Cook v. Sprigg*, in which it was successfully so pleaded. They recognise therefore that Act of State may be pleaded against a British inhabitant of conquered or ceded territory. But this seems an unsatisfactory half-way house. If a British naval squadron bombarded a foreign port and incidentally damaged property belonging to a British subject, is it really contended that he would have an action? Is it not a matter of jurisdiction rather than of nationality? Within the jurisdiction aliens enjoy the same protection as British subjects, and outside it British subjects surely run the same risks as aliens. *Cook v. Sprigg* plainly assists this view; and it is a pity that *Walker v. Baird* is so often cited for the alleged immunity of British subjects, for there the plaintiff was within the jurisdiction and the result would very likely have been the same had he been an alien. Since, however, these criticisms apply primarily to the dicta of the House of Lords in *Johnstone v. Pedlar*, it would be unreasonable to upbraid textbooks for following them as best they can.

The conflicts between the House of Commons and the courts form another somewhat "exotic" subject, but their lessons are hardly less valuable than those of the struggle with the Crown. The chapter on Parliamentary Privilege goes straight to the heart of this topic, and the material is excellent. The exposition could perhaps be improved in two minor respects. First, there is no narrative of the contest of 1839-40 which explains the sequence of events. Time after time students who have read *Stockdale v. Hansard* with emotion, and who then pardonably overlook the

second paragraph of the footnote on p. 140, conclude that the courts won a great victory and never suspect that they surrendered unconditionally when it came to enforcing the judgment. The introduction sums up the law very well on p. 125, but perhaps it is rather too abstract a statement: at any rate, the point is constantly missed. Secondly, one would welcome some remarks about the Houses' special jurisdiction within their own walls, which once again brings out the problem of enforcing the law under co-ordinate jurisdictions. *R. v. Graham-Campbell, ex p. Herbert* [1931] 1 K.B. 594 is an admirable illustration for students, but rather surprisingly it receives no mention.

Much interest will be aroused by the section on the maintenance of order, where controversial ground can hardly be avoided. It is curious that the late Lord Hewart, the scourge of the executive, was more than any other modern judge the author of decisions which have seemed to academic critics to undermine constitutional liberties. *Thomas v. Sawkins* receives only perfunctory notice, and more might well be said of its facts and of the arguments for and against it. Then, of course, comes *Duncan v. Jones*, and here (as in the previous edition) there begins some heavy weather. For, as they launch into this dangerous water, the authors first of all cast the compass overboard by declaring that there is no clear distinction between preventive and punitive justice. Then they make for port by way of an elaborate discussion of causation, using "cause" in an ambiguous sense. They set *Beatty v. Gillbanks* and *Duncan v. Jones* side by side and discuss them as if both involved the same charge. It is said that "it was by no means certain that *Beatty v. Gillbanks* had been rightly decided on the facts, whether, that is to say, an innocent, unprovocative meeting could not be forbidden or dispersed on the ground that it 'caused' a breach of the peace by opponents." But no such question ever arose in *Beatty v. Gillbanks*, which was an appeal from a conviction for unlawful assembly and an order for security for keeping the peace. Another surprising statement is that the court which decided *Duncan v. Jones* "would doubtless have decided *Beatty v. Gillbanks* otherwise than it was actually decided"; and there follows a submission that if a charge for obstruction could have been made in *Beatty v. Gillbanks* it would necessarily have failed because the Salvation Army's procession could not have "caused" the disturbance. These bold assertions are doubtless necessitated by the daring line of argument. To a more pedestrian lawyer the distinction between preventive justice (for the paramount purpose of preserving the public peace) and punitive justice (for inflicting punishment for a proved offence) will assuredly be plain. As the Irish cases and *Thomas v. Sawkins* show, the preventive power has to be exercised if a breach of the peace is reasonably apprehended, and then the only question is how it may most reasonably be prevented. The question whether A, B or C would "cause" the

disturbance, if it were to occur, is irrelevant, and to "cause" in this sense is merely "to provide occasion for." But in a punitive case to "cause" is "to be criminally responsible for," an entirely different sense. If it is only understood that persons innocent of any crime may in an emergency have to suffer restraint for the greater good of preserving the Queen's peace (and that if they resist the necessary action taken by the police to preserve it they may become criminally liable too), all the cases fall into place. The "orange lily" case and the findings of quarter sessions in *Duncan v. Jones* are particularly good illustrations. No argument need then be constructed to reconcile the cases by taking points which did not arise in them, or by conjecturing how they might have been decided in different circumstances.

It is a pleasure now to turn to the supremely important chapter on administrative law, and to record the respectful opinion that this is one of the best pieces on the subject in print. The authors (*O si sic omnes*) have the great merit of understanding the historical evolution of the case law, and in being able to descry how the old foundations, which earlier judges laboured to build, have been shaken in the decisions of the last decade. Voices crying in the wilderness will find solace here, though of a melancholy kind. *Franklin's* case and *Nakkuda Ali's* case are, of course, prominent in the discussion, and the latter case (decided on the matter in hand "quite unnecessarily") is aptly contrasted with a decision of the Conseil d'Etat in 1945—a decision so short and to the point that it might profitably be quoted in the footnote on p. 346. The central issue is clearly seen: it should be the mission of the law to impart the elements of fair procedure to administrative authorities, who "need to be protected from the chances of error." "Perhaps we may be brought to admit frankly the need for an inquisitory procedure before such tribunals, and train the inquisitors to make sure that they deal fairly and completely with the evidence that is available." But what is happening? That is seen no less clearly. There is the "tendency of the courts in recent years to relinquish control over executive or administrative authorities," contrary to "the spirit of the old law" which was "that the rule excluding bias and the maxim *audi alteram partem* should come into play wherever private rights or interests were at least directly affected." "It seems as though the courts have been anxious not to be accused of interfering with the conduct of the administration." "No harm would have been done by setting up standards for the conduct of administrative authorities" but "the effect of the policy of non-interference is to tell administrative authorities that they need not conform to those standards, that they need not consider private interests, and may even indulge a bias against private interests, that in short they need not even try to keep an open mind." How well this passage foreshadows *Crichel Down*. It fittingly concludes "it is hard to think that this

attitude would have commended itself to the great judges of the sixties who built up our system of administrative law round the solid armature of the prerogative writs." It is however suggested that *R. v. Northumberland Compensation Appeal Tribunal, ex p. Shaw* may "prove to be the turn of the tide." This is greatly to be hoped, but not easily to be believed, for that case arose out of the decision of a point of law by a tribunal acting strictly judicially, not out of the exercise of discretionary power involving standards of administrative conduct. And, as is truly said, the decision may have the effect of preventing tribunals from stating their reasons and so laying themselves open to attacks on their "speaking orders."

Notable in this part of the book is the wealth of contributions from Australia. Notable also is the bare mention of America: there is not even a reference to the Federal Administrative Procedure Act. The Australian cases are most welcome, and deal with intriguing questions: whether the Crown is bound by a government contract for which funds have not yet been voted; whether the Crown can be fined for a statutory crime; and whether the orders of a war-time seed control committee could be impugned because their motive was to promote the committee's trading interests. The authors' comments on this last case are particularly interesting. There are also useful excerpts from Australian judgments in the introductions.

"Judicial Control" as here treated is a vast subject, including among much else Crown Proceedings. That section is admirably presented, with suitable emphasis on the surviving anomalies, and with no attempt to pick holes in the language of the Crown Proceedings Act. Plenty of space has been allowed for the discussion, and the Act is neatly summarised. One is particularly glad to find a passage on the competence of statutory authorities to fetter their powers by contract—an important and difficult subject which standard textbooks usually avoid.

But, when all is said, the centre of interest in this edition is likely to remain the section entitled "Principles Governing the Exercise of Discretionary Powers." Some of its purple patches have been quoted above, and there is much else to commend; but students will not find it easy. That would be too much to expect in the present state of the law, confused as it is by the technicalities of certiorari and the judicial retreat from "natural justice." The commentary is full of just and trenchant observations, there is no mincing of words, and if from time to time the conclusions are weakened by an endeavour to be all things to all men, that also must be counted for merit: for there is great need for some coalescence of opinion in this field of doubts and differences. Such criticisms as could be offered are better forgotten, for this chapter deserves an unqualified welcome. By its aid the eyes of many

students will, if they are diligent, be opened to the really live issues which constitutional law contains for this generation.

H. W. R. WADE.

Williams on the Law of Executors and Administrators. Thirteenth Edition by SIR DAVID HUGHES PARRY, M.A., LL.D., D.C.L., an honorary Bencher of the Inner Temple and Professor of English Law, University of London, assisted by DONALD CHARLES POTTER, LL.B., of the Middle Temple and Lincoln's Inn, Barrister-at-Law. [London : Stevens & Sons, Ltd. 1953. In two volumes, ccxxvii and 1347 pp. £8 8s. net.]

THE previous (twelfth) edition of Williams on *Executors* was the work of Sir David Hughes Parry and Mr. John Cherry upwards of twenty-three years ago. Continuity is preserved in this (thirteenth) edition by the master hand of Sir David : and at the same time we welcome his new assistant, Mr. Potter, whose labours conjointly with those of the publishers in achieving a much more convenient format and layout, have produced conformity with modern requirements and a saving of about a hundred pages. Nevertheless the great tradition of the book, which dates back to Sir E. Vaughan Williams's original production of 1832, is maintained. At last we are presented with unbroken numbering of chapters (1 to 95) and of paragraphs (1 to 2064 with convenient rubrics) throughout.

The Intestates' Estates Act, 1952—a private member's measure of which the Parliamentary fate hung in the balance until a late stage—received the Royal Assent only on October 30, 1952; and it is therefore not surprising, although something of a disappointment, that it has not been possible to deal with this otherwise than in an appendix which sets out the text of the statute and in the preface which contains a very brief analysis of its provisions, both those which are substitutional (in regard to deaths after January 1, 1953) for sections 46 to 49 of the Administration of Estates Act, 1925, and those which amend the Inheritance (Family Provision) Act, 1938. The last-mentioned Act as unamended is of course accorded a chapter in the text but from a practitioner's point of view not a very ample one.

The topic which has been tackled afresh after twenty-three years is in its nature a sprawling one; and it overlaps with many others, notably the law of trusts. The problem which confronts any editor of this work must needs be, in Maitland's phrase, where to tear the seamless web : and still more at what points to cut the ramifying threads. It is no disparagement of the methods adopted in this edition to suggest that in more than one instance they might with advantage have been shorn somewhat nearer to the central

theme. On the other hand Part V (Procedure in Actions by and against Personal Representatives) might hereafter usefully incorporate an additional and preliminary chapter on the history of proceedings for administration of an estate and for execution of a trust, much as the late Sir Percy Winfield adumbrated his substantive work on the law of conspiracy by a most illuminating prefatory volume on the history of that topic. But it is fair to add that in the context of the administration action a good deal of additional research would be involved into records of suits; and that perhaps this is more a matter for a separate monograph than for a flashback in a work designed for practitioners.

It is odd that the index contains a heading *torts* but not *tort* or a cross reference to *executor de son tort*. The reader will however be gratified, on exploring the last-mentioned heading, to turn to page 27 and there to find that the classic example has not been omitted. "Thus it is said (Dyer 166 b in margin) that milking the cows (*Sed quare* if the milker makes no claim to the milk) even by the widow of the deceased . . . will constitute an executorship *de son tort*."

An onerous task ably and conscientiously performed, and a product for which both branches of the profession will be grateful to the editors and to the publishers.

HENRY SALT.

Key and Elphinstone's Precedents in Conveyancing. Fifteenth Edition in Three Volumes, by R. R. A. WALKER, R. G. METCALFE, E. H. BODKIN, L. R. NORRIS, E. J. T. G. BAGSHAW and V. G. H. HALLETT, and T. A. BLANCO WHITE, Barristers-at-Law (Vol. 1); by the same Editors other than Mr. Metcalfe (Vol. 2); and—written by the late HAROLD POTTER, LL.D., Barrister-at-Law—and edited by THOMAS IVOR CASSWELL, B.A., a Registrar in H.M. Land Registry (Vol. 3 on Registered Land). [London: Sweet & Maxwell, Ltd. 1953 (Vols. 1 & 2) and 1954 (Vol. 3). clxxii and 1467 pp. (Vol. 1). cliv and 1241 pp. (Vol. 2). xxxvi and 678 pp. (Vol. 3). £15 15s.]

THE enormous and responsible—one might almost say fiduciary—task of producing a fifteenth edition of "K. and E." has wisely been entrusted by the Publisher to a wider range of editors than the three Oxonians (Dr. Potter's volume on registered land apart) who were responsible for the fourteenth in 1940 or the four who shouldered the task in 1932. Cambridge men will note with pleasure that the present editors include distinguished contributors who passed through their Law School. The apportionment of the labours within this multiple Hercules is indicated at the outset of each volume and it would be invidious to dismember a team

which has co-operated so splendidly and without exception so expertly. One may however pause to lament the untimely death in 1951 of Dr. Potter, the beloved Dean of Laws at King's College, London, who wrote as an addition to the fourteenth edition the third volume on registered land, based on his own *Principles and Practice of Registered Land Conveyancing* of some years earlier.

Potter (who in addition to teaching law had qualified with first class honours both as a solicitor and later as a barrister) was among the foremost to grasp the increasing importance of registration of title. In this view he has been thus far confirmed by the steady extension of the compulsory areas. His third volume of "K. and E.," now in the capable hands of Mr. Registrar Casswell, has proved itself to be of abiding value. The introductory matter of 355 pp.—Part I, Principles affecting Registered Land; Part II, Conveyancing Practice—fits well with the annotated Forms and Precedents covering 230 pp.: and the whole volume may well eclipse Fortescue-Brickdale and Stewart-Wallace's work of which the third edition appeared in 1927. The present third volume for the first time incorporates in an appendix the Land Registration Fee Orders, 1930 and 1950. It omits the specially adapted Wartime and Emergency Precedents which the third volume of 1940 usefully incorporated in a supplement and in which Miss Bicknell exercised ingenuity and good sense. If we lament the disappearance of a neat little group of precedents we rejoice that time and the outcome of the "emergency" have rendered them no longer necessary. For the rest Mr. Casswell has added his own moderating comments upon Dr. Potter's more challenging views; and in chapter 5 gives a sober statement of the real effect of *Re 139 Deptford High Street* [1951] Ch. 884. Some forms have been omitted and some added, usually to advantage—e.g., the inclusion under Transfers of Form 33 (sale of a council house), while under Settlements Form 21 is a shortened version of the previous Form 16.

When one turns to Volumes 1 and 2, which constitute the great bulk of the work and are the lineal successors of the original work of 1878, one finds plenty of points to criticise as matters of detail and selection. Who, in reviewing even the fullest or most classical of anthologies, was ever satisfied? It is no more than just to state clearly at the outset that the work has been most reliably and thoroughly carried out, and without loss of the economy of words for which the forms and the precedents alike have always been famous. Of course the esoteric flavour was watered when the abbreviations disappeared. No longer are our imaginations stimulated, like that of a former editor who was incidentally a churchwarden, to "see men as trustees walking."

It is disappointing that publication was ahead of the decision of the House of Lords in *Re Chapman's Settlement Trusts* (sub nom. *Chapman v. Chapman*) 1954 2 W.L.R. 723, although not of the same case in the Court of Appeal coupled with *Re Downshire*

Settled Estates and *Re Blackwell's Settlement Trusts* [1953] Ch. 218. The editor concerned however must regard "trust-busting" with distaste, for no discernible help is given to British Shermans or would-be trust-busters. The only reference to *Re Downshire* is in a brief footnote at p. 625 of Vol. 2. This field is left open for the forthcoming publication (by the same publisher) of a new work to be known (it is understood) as *Tax Planning with Precedents*, by D. C. Potter and H. H. Monroe. Perhaps the use of the post-card, enclosed in the present edition of *Key and Elphinstone* and designed to facilitate the reader's bespeaking annual supplements, will elicit some supplemental precedents of carefully designed points of doubt which can be advantageously "compromised" hereafter. Incidentally, if the annual supplement so adumbrated is kept up in type and made cumulative for many years to come, it should obviate the expense of replacing the whole work which to a young practitioner is staggering. That is not to say that fifteen guineas is at all excessive in the present state of printing and binding costs. But a time will come—failing cumulative supplements over a prolonged period for all legal works of these dimensions—when only wealthy men or earners in the upper brackets of taxation will be able to afford them, and poorer or younger men will rely wholly on the libraries accessible to them.

Further omissions, or virtual omissions, are forms of settlement and of deeds of covenant designed to arrange a client's affairs so as to attract the minimum instead of the maximum of taxation. Prideaux's *Precedents*, 24th edition, Vol. 3, pp. 213 to 222, are far from comprehensive, but they do give some guidance; and the same applies to the 1954 supplement to the *Encyclopedia of Forms and Precedents*, pp. 566 *et seq.* The nearest approach in the work under review is a form of bond in Vol. 1, at p. 306, and a form of covenant demurely tucked away under "Trusts of Additional Property" in Vol. 2, at p. 673.

Similarly transactions whereby a life tenant acquires the future interest or interests expectant on his life interest and so (for purposes of Estate Duty) technically "enlarges" it are scantily dealt with, the nearest approach being on pp. 883 *et seq.* of Vol. 1.

Deeds of Family Arrangement are neglected—which is doubtless good for practitioners so far as it (the neglect) goes. But they are not neglected in the *Encyclopedia*, Vol. 2, pp. 207 *et seq.*, and 1954 Supplement, pp. 26 *et seq.*

Conversely there are many new forms for implementing or paying regard to recent legislation, such as the Building Societies Act, 1939, National Health Service Act, 1946, and so forth.

The preliminary note to *Appointments* omits to notice *Re Merton* [1953] 1 W.L.R. 1096, and *Re Greaves* [1953] 3 W.L.R. 987, reversed [1954] Ch. 434. Is an appointment of a gamekeeper by the lord of a manor still a necessary precedent?

The preliminary note to *Appointments of New Trustees* omits

to notice *Re Brockbank* [1948] Ch. 206. The preliminary note to Arbitration has been somewhat drastically reduced from 6½ pp. to half a page. Conditions of Sale have been well revised. Notes on the Planning Legislation, 1947–53, are to be found at pp. 329–31 of Vol. 1, and special conditions on planning matters incorporated at pp. 381–85. At pp. 443–48 a preliminary note on covenants gathers up what were formerly scattered footnotes. Under Conveyances on Sale there are several new preliminary notes (mostly drafted by the late Mr. Farrer and incomparably better than some of his earlier work such as his notes on the Rule against Perpetuities) and some new forms. But are some or all of Forms 6, 17, 23, 24, and 49 otiose or repetitive? New matter appears under Leases (Agricultural) in the light of the Acts of 1947 and 1948.

In Vol. 2 the preliminary note on Mortmain and Charity has been extended with new matter at pp. 315–7. Partnership Forms are curtailed. *Whitehill v. Bradford* [1952] Ch. 236, goes unnoticed despite its bearing on the status of goodwill as a partnership asset before and after the National Health Service Acts, 1946 and 1949. The topic of Patents has been naturally somewhat recast.

But the foregoing criticisms are offered constructively and in no carping spirit. The practitioners of both branches of the profession are enormously indebted to the Editors and Publisher.

HENRY SALT.

Books also received include the following:—

Aiyar, K. V. K., *Professional Conduct and Advocacy*. [Oxford University Press. 1954. 12s. 6d.]

Cairns, M. B., *The Law of Tort in Local Government*. [Shaw & Sons, Ltd. 1954. 21s.]

Coddington, F. J. O., *Advice on Advocacy in the Lower Courts*, [Justice of the Peace, Ltd. 1953. 5s. 6d.]

Colinvaux, R. P., *The Carriage of Goods by Sea Act, 1924*. [Stevens & Sons, Ltd. 1954. 22s. 6d.]

Jacobs, C. E., *Law Writers and the Courts*. [Cambridge University Press. 1954. 26s.]

Current Legal Problems, 1954. Edited by G. W. Keeton and G. Schwarzenberger. [Stevens & Sons, Ltd. 1954. 32s. 6d.]

Current Law Guide No. 11. The Housing Repairs & Rents Act, 1954. By Ashley Bramall. [Stevens & Sons, Ltd. 1954, 8s. 6d.]

Danby, H., *The Book of Cleanness*. The Code of Maimonides—Book Ten (Yale Judaica Series—Vol. VIII). Translated from the Hebrew by H. Danby. [Oxford University Press. 1954. 60s.]

- Dodd, E. M., *American Business Corporations until 1860*. [Harvard University—Oxford University Press. 1954. 60s.]
- Gower, Prof. L. C. B., *The Principles of Modern Company Law*. [Stevens & Sons, Ltd. 1954. 45s.]
- Hake (E.), *Epieikeia—A Dialogue on Equity in Three Parts*. Edited by D. E. C. Yale. [Oxford University Press. 1953, 24s.]
- Harris, J. P., *The Advice and Consent of the Senate*. [Cambridge University Press. 1953. 37s. 6d.]
- Sir William Searle Holdsworth, 1871–1944. A memorial address by Prof. A. L. Goodhart. Selden Society Annual Lecture, 1954. [Institute of Advanced Legal Studies. 4s.]
- Lipsky, G. A., *Law and Politics in the World Community*. [Cambridge University Press. 1953. 45s.]
- McNair, Sir Arnold D., *The Development of International Justice*. [New York University Press. 1954. \$2.50.]
- Monroe, J. G., *The Law of Stamp Duties*. [Sweet & Maxwell, Ltd. 1954. 25s.]
- Pawate, I. S., *Contract and the Freedom of the Debtor in the Common Law*. [Bombay: N. M. Tripathi, Ltd. 1953. 12s. 6d.]
- Rowland, P. M. B., *Trust Accounts*. [Butterworths & Co., Ltd. 1954. 38s. 6d.]
- Rordam, K., *Treatises on the Baltcon-Charterparty*. [George Allen Unwin, Ltd. 1954. 32s.]
- Status of Multilateral Conventions of which the Secretary-General acts as Depositary*. And Supplements 1–4. [H.M. Stationery Office. 37s. 6d. Supplements, 12s. 6d.]
- Seward, G. H., *Sex and the Social Order*. [Penguin Books, Harmondsworth, Middlesex. 1954. 2s. 6d.]
- The Law in Action*. A Series of Broadcast Talks, with a Foreword by Lord Asquith of Bishopstone. [Stevens & Sons, Ltd. 1954. 7s. 6d.]
- Van den Heever, F. P., *Breach of Promise and Seduction in South African Law*. [Juta & Co., Ltd. 1954. 25s.]
- Weber, M., *On Law in Economy and Society*. Edited and Annotated by Max Rheinstein. [Harvard University Press. 1954. \$6.00.]

New Editions :—

- Beattie, C. N., *The Elements of Income Tax Law*. 2nd edition. [Stevens & Sons, Ltd. 1953. 25s.]

- Cheshire, G. C., and Fifoot, C. H. S., *Cases on the Law of Contract*, 2nd edition. [Butterworth & Co., Ltd. 1954. 40s.]
- Charlesworth, J., *The Principles of Company Law*. 6th edition. [Stevens & Sons, Ltd. 1954. 17s. 6d.]
- Davis, A. G., *The Law Relating to Commercial Letters of Credit*. 2nd edition. [Sir Isaac Pitman & Sons, Ltd. 1954. 30s.]
- Dayes' *Handy Book of Solicitors' Costs*. 9th edition by T. O. Carr. [Sweet & Maxwell, Ltd. 1954. 42s.]
- Heywood and Massey—*Court of Protection Practice*. 7th edition by Donald G. Hunt and John F. Phillips. [Stevens & Sons, Ltd. 1954. £5 5s.]
- Keeton, G. W., *Law of Trusts*. 6th edition. [Sir Isaac Pitman & Sons, Ltd. 1954. 45s.]
- Millner's *Questions and Answers on Company Law*. 3rd edition by Peter Allsop. [Sweet & Maxwell, Ltd. 1954. 6s. 6d.]
- Payne's *Carriage of Goods by Sea*. 6th edition by J. Milnes Holden. [Butterworth & Co., Ltd. 1954. 21s.]
- Radcliffe, G. R. Y. and Cross, G., *The English Legal System*. 3rd edition. [Butterworth & Co., Ltd. 1954. 27s. 6d.]
- Rivington's *Epitome of Snell's Equity*. 24th edition. 4th edition by Patrick Jenkin. [Sweet & Maxwell, Ltd. 1954. 17s. 6d.]
- Snell's *Principles of Equity*. 24th edition by R. E. Megarry and P. V. Baker. [Sweet & Maxwell, Ltd. 1954. 45s.]
- Stranders' *Questions and Answers on Contracts*. 4th edition by B. Macaulay. [Sweet & Maxwell, Ltd. 1954. 6s. 6d.]

Communications concerning articles and notes should be sent to Professor S. J. Bailey, St. John's College, Cambridge. Books for review should be sent to The Cambridge Law Journal, Squire Law Library, The Old Schools, Cambridge.

It is regretted that the limited space available for book reviews has made it necessary to give no more than short notices of some of the works received for review.

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